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In the Supreme Court of the United States

OCTOBER TERM 1966

No. ~~1324~~ 79

TV PIX, INC. and WELLS TV, INC.,
Appellants,

v.

J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, Commissioners of the Public Service Commission of the State of Nevada,
Appellees.

On Appeal from the United States District Court for the District of Nevada

JURISDICTIONAL STATEMENT

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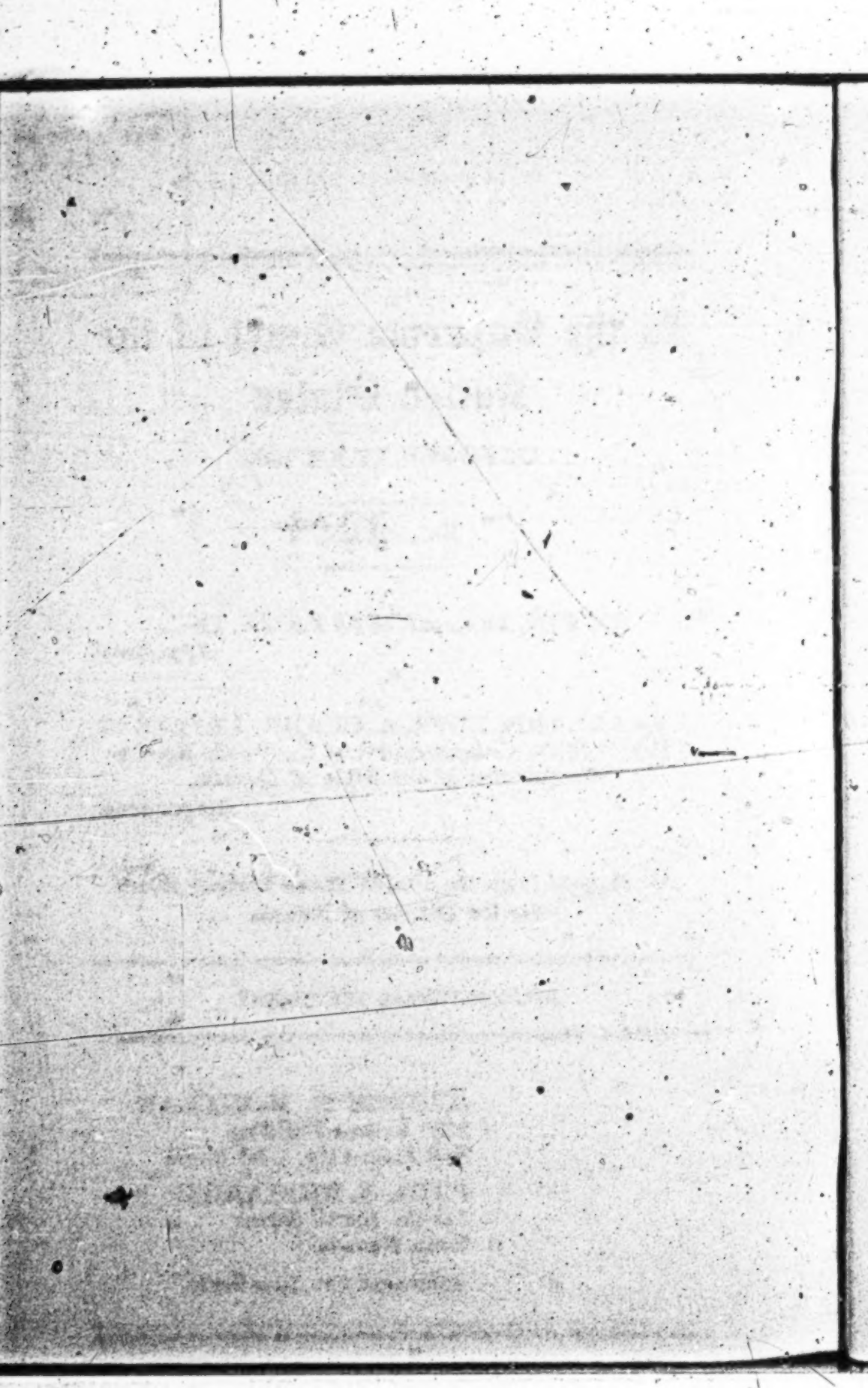

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In the Supreme Court of the United States

OCTOBER TERM 1966

No.....

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Appellants,

v.

J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, Commissioners of the Public Service Commission of the State of Nevada,
Appellees.

On Appeal from the United States District Court for the District of Nevada

JURISDICTIONAL STATEMENT

OPINION BELOW

The written opinion of the District Court is attached to the Jurisdictional Statement as Appendix "A". It was not reported.

STATEMENT OF JURISDICTION

These actions were filed to enjoin the defendants, Public Service Commissioners of the State of Nevada,

from making effective certain rulings and determinations made under color of the state statute on the grounds that such rulings and the state statute as interpreted by defendants violated the Interstate Commerce Clause, the Supremacy Clause, and the Fourteenth Amendment to the Constitution of the United States. A three-judge court dismissed plaintiffs' complaints on December 16, 1966 after notice and hearing, thereby denying both interlocutory and permanent injunctions. Motions for a new trial, to amend the judgment, and a memorandum in support of said motions were filed by the plaintiffs on December 28, 1966; an Order denying plaintiffs' said motions was dated and filed January 19, 1967. The Appellants filed a Notice of Appeal to this court on February 6, 1967. The jurisdiction of this court rests upon 28 USCA Section 1253.

Among the cases believed to sustain jurisdiction are: *Florida Lime and Avocado v. Jacobsen,* (1960) 362 U.S. 73, 4 L.Ed(2d) 568, 80 S. Ct. 568; *England v. Louisiana Medical Examiners,* (1964) 375 U.S. 411, 11 L.Ed(2d) 440, 84 S. Ct. 461; *Baggett v. Bullitt,* (1964) 377 U.S. 360, 12 L.Ed. (2d) 377, 84 S. Ct. 1316; *Frasier v. Board of Trustees of University of No. Carolina,* (1955, D.C. N.C.), 134 F. Supp. 589; aff. 350 U.S. 979, 100 L.Ed. 848, 76 S. Ct. 467. Other cases are cited at pp. 8-11, *infra.*

The state statute and rulings thereunder believed to raise the constitutional questions involved in this litigation are attached collectively as Appendix "B".

QUESTIONS PRESENTED

1. Whether the court erred in failing to rule upon the constitutional questions presented upon their merits.

(a) Whether the doctrine of federal abstention is applicable where there is a justiciable controversy between the parties involving a constitutional question and no non-federal issue is presented.

(b) Whether the doctrine of federal abstention is applicable where an issue unresolved by the state court but decided by a state administrative agency having original authority to decide such question involves solely the application of federal law.

(c) Whether, if federal abstention is applicable, the court erred in dismissing the cases rather than simply staying proceedings pending a state court ruling.

2. Whether the state of Nevada can regulate community antenna systems as public utilities consistently with the Commerce Clause of the United States Constitution.

3. Whether the state of Nevada can regulate community antenna systems as public utilities consistently with the Supremacy Clause of the United States Constitution.

4. Whether state public utility-type regulation of community antenna systems would violate the Fourteenth Amendment of the United States Constitution inasmuch as the state is powerless to provide correlative protection.

STATEMENT OF THE CASE

Appellants own and operate community antenna systems in Wells, Elko, Carson City and Tahoe, Nevada. Essentially their business activities consist of picking up signals from out-of-state television stations, causing them to be transmitted by microwave common carrier from a pick-up point to a point of distribution, amplifying such signals and transmitting them to subscribers through distribution facilities located in the aforesaid communities. The Federal Communications Commisson has ruled, upon numerous occasions, that community antenna systems constitute interstate commerce; that they are a link in the chain of interstate communications. Such rulings have been affirmed by the Circuit Court of Appeals for the District of Columbia. (See infra pp. 11, 12). Notwithstanding such rulings, the state of Nevada, through the respondents (defendants below), who are members of the Public Service Commission of said state, made a series of unequivocal rulings to the effect that the plaintiffs' community antenna systems are not engaged in interstate communications but rather are intrastate in nature, and that the defendants have the authority to regulate plaintiffs' business activities as public utilities under the Nevada statute. TV Pix, Inc., and Wells TV, Inc., filed separate actions asserting that the state had no constitutional authority to regulate such systems on the grounds that (1) state regulation of community antenna systems as public utilities would conflict with the Commerce Clause of the Unied States Constitution; (2) state regulation of community antenna systems as public utilities would conflict with

the Supremacy Clause of the United States Constitution and the Communications Act of 1934; and (3) state public utility-type regulation of community antenna systems would violate the Fourteenth Amendment of the United States Constitution inasmuch as the state was powerless to provide any correlative protection as an incident of such regulation.

Upon plaintiffs' motions, a three-judge court was convened to determine the questions involved and the cases were consolidated for hearing. At a hearing on September 30, 1966, the issues were submitted upon a written Stipulation of Fact and the evidence presented by the parties. The evidence received consisted primarily of a description of the operations of plaintiffs' systems in the communities served. Plaintiffs pick up and deliver to their subscribers the television signals broadcast from out-of-state stations carrying network programs and nationally distributed features and syndicaetd films. The evidence was undisputed that the defendants had entered orders and issued general notices to all community antenna systems in the state to the effect that the defendants were acting pursuant to the authority contained in the state statute and that the state Public Service Commission asserted jurisdiction to regulate the plaintiffs' community antenna systems as public utilities. Plaintiffs were required by such orders to file applications for certificates of public convenience and necessity. Defendants issued an order to each of the plaintiffs requiring it to show cause why it should not cease and desist transacting business as a community antenna system in each of the cities served until such

certificate was issued by the defendants. The defendants' orders constituted, under state law, a determination by defendants that the state of Nevada had jurisdiction to regulate as public utilities the plaintiffs' systems. The plaintiffs' complaints assert that constitutional and federal questions were presented by such orders.

In their answers, the defendants admit that they have interpreted and do interpret the Nevada statute as authorizing them to regulate community antenna systems in the State of Nevada as public utilities. They admit that they have interpreted and do interpret the activities of the plaintiffs as not constituting interstate commerce. They admitted that they had opened formal investigations with a view to regulating plaintiffs' systems under color of the state statute. (cf. para. 9 of Plaintiff's Complaint with para. 10 of defendants' Answer.)

Following a hearing, the three-judge court convened pursuant to 28 USCA Section 2281, held that although the jurisdiction of the District Court may have been properly invoked, the court in this case should apply the doctrine of federal abstention upon the ground that there were unresolved state issues. Emphasizing that the state statute provided that interstate commerce was excluded from the definition of public utilities subject to defendants' jurisdiction, the court stated that "if the statutory exclusion of interstate commerce is given a broad interpretation by the state courts, the difficult questions of infringement of state action upon federal constitutional prohibitions may never be reached." The court dismissed the complaints.

THE QUESTIONS ARE SUBSTANTIAL

A. A substantial question exists with respect to the application of the abstention doctrine.

The District Court applied the federal abstention doctrine on the ground that "there are . . . many state questions to be resolved." The District Court did not merely defer a ruling until the plaintiffs had obtained a state determination on the alleged state questions; it dismissed the actions. The record shows without any peradventure of doubt that the defendants had determined that community antenna systems in general and those operated by the plaintiffs in particular, in Wells, Elko, Carson City and Tahoe, were subject to the regulation of the state of Nevada as public utilities. The Nevada statute provides that it "do[es] not apply to interstate commerce." NRS Section 704.020 1(d). The respondents ruled, as Public Service Commissioners of the state of Nevada, that community antenna systems constituted intrastate commerce; that the appellants, in other words, were not engaged in interstate commerce, and that the state statute, therefore, conferred jurisdiction. The rationale of the District Court was: "If the statutory exclusion of interstate commerce is given a broad interpretation by the state courts, the difficult questions of infringement of state action upon federal constitutional prohibitions may never be reached." The difficulty with this position is the only interpretation by the state courts upon "interstate commerce" which is possible necessarily involves the application of federal law. The proposition has long been settled that the determination of whether specific conduct constitutes interstate commerce must be decided under the federal

rule. *Gibbons v. Ogden* (1824) 9 Wheaton 1, 6 L Ed. 23.

In *England v. Louisiana Medical Examiners*, (1964) 375 U.S. 411, 11 L.Ed(2d) 440, 84 S. Ct. 461, this court interpreted *Government and Civic Employees Organizing Co. v. Windsor*, (1957) 353 U.S. 364, 1 L.Ed(2d) 894, 77 S. Ct. 838, to the effect that federal claims need not be litigated in state courts. *England* holds that while the abstention principle authorizes a District Court to refer a state question to the state judicial system for adjudication, the plaintiff may reserve a federal question of adjudication through the federal system by an express statement into the record in the state proceeding. If, in a case involving both federal and state questions, the federal issues may be reserved, or if, as this court inferred in *NAACP v. Button*, (1963) 371 U.S. 415, 9 L.Ed(2d) 405, 83 S. Ct. 328, a party has the right to return to the District Court after obtaining an authoritative state court construction upon state law, it follows that abstention is inappropriate where no question other than federal ones require adjudication.

The court has held abstention to be inappropriate where there is no uncertainty under state law, (*Baggett v. Bullitt* (1964) 377 U.S. 360, 12 L.Ed(2d) 377, 84 S. Ct. 1316) and where a state ruling on local law could not decide the federal question. *Public Utilities Commission v. United Fuel Gas Co.*, (1942) 317 U.S. 456, 87 L.Ed. 396, 63 S. Ct. 369. Where no issue remained to be resolved by the state court ". . . no occasion is presented for abstention and the litigation should be

disposed of as expeditiously as is consistent with proper judicial administration." *Turner v. Memphis* (1962) 369 U.S. 350, 7 L.Ed(2d) 762, 82 S. Ct. 805.

The fact that the state statute excluded interstate commerce from the area over which the state agency was given jurisdiction does not mean that the determination of the conduct which constitutes interstate commerce becomes a state question rather than a federal one. The language of the statute excluding interstate commerce is superfluous. As a matter of constitutional law, state power insofar as the regulation of interstate commerce is concerned, is excluded. *Gibbons v. Ogden, supra.*

Assertion of jurisdiction by a state agency in controvention of the United States Constitution necessarily is illegal as a matter of federal law. In the instant case, the unlawful assertion of jurisdiction by the state agency gives rise to the constitutional question and gives plaintiff a right to a determination of the constitutional issues under 28 USCA 2281. It has been held repeatedly that 28 USCA 2281 "requires a three-judge court not only when it is sought to restrain the enforcement of an unconstitutional statute but also the enforcement of an unconstitutional order of an administrative board or commission clothed with authority and acting under the laws of the state". *Frasier v. Board of Trustees,* (D.C. M.D. N.C. 1955) 134 F. Supp. 589, citing numerous cases; affirmed 350 U.S. 979, 100 L.Ed. 848, 76 S. Ct. 467.

This is not a case like *PSC of Utah v. Wycoff Co.,* (1952) 344 U.S. 237, 97 L.Ed. 291, 73 S. Ct. 286, where the state agency had made no order raising a

constitutional question, or *Burford v. Sun Oil Co.*, (1942) 319 U.S. 315, 87 L.Ed. 1424, 63 S. Ct. 1098, where a state agency with admitted jurisdiction made an order which was subject to review in the state courts against an admittedly intrastate utility. In the instant case, the defendants' orders at the same time raised the constitutional issues presented by the Appellants for adjudication on the merits and constituted a legal conclusion which contradicted the decisions of the FCC and at least one circuit court of appeals on a federal question. (See infra pp. 11, 12).

The plaintiffs are placed in an untenable position by the ruling. If the District Court's decision is not appealed, since the ruling dismissed the action, it is possible that the judgment may be res adjudicata, even though there was no adjudication on the merits. If, on the other hand, the plaintiffs file an action in the state court and the eventual ruling is adverse to plaintiffs' positon, notwithstanding the clear federal rule adjudicating community antenna systems to constitute interstate commerce, plaintiffs' right to review by this court would be extremely tenuous. A petition for certiorari under 28 USCA 1257 cannot be equated with the summary adjudication of federal and constitutional questions under 28 USCA 2281 and appealed under 28 USCA 1253. This court held in *England, supra*, that review by certiorari " . . . is an inadequate substitute for the initial district court determination . . . to which the [plaintiffs are] entitled in the federal courts. This is true as to issues of law. It is especially true as to issues of fact," at page 416 U.S. Reporter, 446 L.Ed.

Appellants suggest the application of the teaching of *Florida Lime and Avocado v. Jacobsen*, (1960) 362 U.S. 73, 4 L.Ed(2d) 568, 80 S. Ct. 568.

> " . . . There is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy, which appellants are entitled to have determined on the merits. In these circumstances, the fact that appellants did not contest the validity of [the state statute] nor seek abatement of appellee's [administrative ruling] which, because of the time period necessarily involved, would have resulted in [irreparable damage] does not constitute an impediment to their right to seek an injunction in the federal court against [the state statute] on the ground that it violates the Constitution of the United States and the [federal statute, in the instant case the Communications Act of 1934]."

B. Substantial constitutional questions exist with respect to the powers of a state to regulate community antenna systems as public utilities.

THE INTERSTATE COMMERCE ISSUE

The FCC ruled repeatedly that:

> " . . . CATV systems constitute interstate communication by wire, since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber)—a chain which is now well established . . . as interstate communication.' *Capital City Telephone Co.*, 3 FCC 189, 198 (citing *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266). The law is clear that the mere location of communication facilities wholly within one state does

not establish that the communication service rendered over such facilities is an intrastate service, and that a communications service can be interstate or foreign in nature and subject to the Commission's jurisdiction even though all the facilities are located within the confines of one state. *California Interstate Telephone Co. v. FCC*, 328 F.2d 556 (C.A.D.C.); *Ward v. Northern Ohio Telephone Co.*, 300 F.2d 816 (C.A. 6); cert. den. 371 U.S. 820; *Pacific Telatronics, Inc.* FCC 64-1180, 4 R.R. (2d) 145 (1964). CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry, *Clarksburg Publishing Co. v. F.C.C.*, 225 F. 2d 511, 517 (C.A. D.C.), and hence constitute 'interstate communication by wire' to which the provisions of the Act are applicable (Section 2(a), 3(a)). See *American Trucking Association v. United States*, 344 U.S. 298, 311." (Emphasis by the Commission). (FCC Second Report and Order, Docket Nos. 14895, 15233 & 15971, 31 F.R. 6340).

The District of Columbia Circuit approved the Commission's rule in *Idaho Microwave, Inc. v. FCC*, (1965, CCA, D.C.) 352 F.(2d) 729. Faced with an argument that microwave service to a CATV operator in Burley, Idaho, did not constitute interstate commerce because all of the facilities of the carrier and the CATV were within the state of Idaho, the court said:

"The Burley facility (CATV system) is used as a link in the continuous transmission of television signals from Salt Lake City to Burley, Idaho; there is no interruption in the flow of the signal as it is practically instantaneous. Thus, though Idaho Microwave's physical facilities are located within Idaho, it performs an interstate

communications service when it takes part in the transmission of signals from Utah to Idaho."

In other cases involving interstate communication, this court has held that states cannot impose public utility-type controls without express congressional authorization. *Buck v. Kuykendall* (1925) 267 U.S. 307, 69 L.Ed. 623, 45 S. Ct. 324, 38 A.L.R. 286; *Bush & Sons Co. v. Maloy*, (1925) 267 U.S. 317, 69 L.Ed. 627, 45 S. Ct. 323; cf. *Fisher's Blend Station v. Tax Commission*, (1936) 297 U.S. 650, 80 L.Ed. 956.

THE SUPREMACY ISSUE

The Commission has also held that CATV systems are not common carriers within the meaning of Title II of the Communications Act. (Second Report and Order, supra, para. 15 and authorities cited). CATV systems are, however, subject to the jurisdiction of the Commission. (Second Report and Order, supra, para. 19).

The policy of the Communications Act is that all communications facilities subject to the Commission's jurisdiction except common carriers are left in the field of free competition. The federal policy is that such facilities are not to be regulated as public utilities. *United States v. Radio Corporation of America*, (1959) 358 U.S. 334, 3 L.Ed(2d) 354, 79 S. Ct. 45; *Pulitzer Publishing Co. v. F.C.C.*, (1957 CCA D.C.) 94 F.(2d) 249. A three-judge court explicitly held in *National Broadcasting Co. v. Board of Public Utility Commissioners*, (1938 D.C. N.J.) 25 F. Supp. 781, that a state could not regulate the operation of a broad-

cast transmitter as a public utility. State regulation of community antenna systems would substantially interfere with federal policy as provided in the Communications Act of 1934.

The existing policies made effective by the Federal Communications Act concerning CATV operation include operating restrictions in a number of areas, including the areas of non-duplication of programs, carriage and non-carriage of the signals of originating and local stations, and non-operation of community antenna systems in certain large metropolitan areas in the country. (Second Report and Order, supra, para. 51-65; 39-41; 41-146). Public utility-type regulation by a state would necessarily and substantially interfere with and invade the area pre-empted by these policies and regulations.

THE FOURTEENTH AMENDMENT ISSUE

The competitors of community antenna systems are commercial television stations, VHF and UHF translators and boosters. These facilities are all licensed and regulated within permissible limits by the FCC under the federal act. The state of Nevada is powerless to protect CATV systems within its borders from this competition. It has been held that public utilities necessarily are entitled to reasonable protection from unlimited competition as a *quid pro quo* for the exercise of public control over their properties. *Brady Transfer and Storage Co. v. United States* (D.C. Ia. 1948) 80 F.Supp. 110, aff. 335 U.S. 875, 93 L.Ed. 418, 69 S. Ct. 239; *Chicago R. R. Co. v. Commerce Commis-*

sion, (1929) 336 Ill. 51, 167 NE 840; *Egyptian Transportation Systems, Inc. v. Louisville & N.R.R. Co. et al.,* (1926) 321 Ill. 580, 152 NE 510; *State ex rel Crown Coach Co. v. Public Service Commission,* (1944) 238 Mo. App. 287, 179 SW(2d) 123.

Appellants suggest, therefore, that the state regulation of CATV as public utilities contravene the Commerce Clause, the Supremacy Clause, and the Fourteenth Amendment to the Constitution of the United States. The question has never been decided by this court or by any federal or state court. Inasmuch as more than 1600 community antenna systems now operate in the United States, and particularly in view of the increased attention being given to state regulation by states throughout the country, a ruling on the substantive question would substantially aid the orderly integration of these facilities into the communications pattern. Adjudication of the constitutional issues is vital to the proper federal-state relationship in this dynamic communications area.

The substantial constitution questions involved justify and require complete presentation to this court.

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE INJUNCTION.

Plaintiffs have a right to an adjudication of the federal question under 28 USCA Section 2281. The court admitted that it had jurisdiction. Abstention constituted an abuse of discretion since there were no non-federal issues. Appellants' arguments are summarized on pp. 7-11 of this Statement of Jurisdiction. Denial of

the right to adjudication of the federal issues under these circumstances constituted an abuse of discretion.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

RESPECTFULLY SUBMITTED this 27th day of March, 1967.

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

TV PIX, INC.,
Plaintiff,
vs.
J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, Commissioners of the Public Service Commission of the State of Nevada,
Defendants.
No. 1814

WELLS TV, INC., a corporation,
Plaintiff,
vs.
J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, Commissioners of the Public Service Commission of the State of Nevada,
Defendants.
No. 1827

Before MERRILL, Circuit Judge, and FOLEY and THOMPSON, District Judges:

PER CURIAM:

Plaintiff in No. 1814 (TV PIX, INC.) is a corporation organized under the laws of the State of Nevada. It owns and operates community antenna systems in Elko, Carson City and Stateline, Nevada.

Plaintiff in No. 1827 (Wells TV, Inc.) is also a corporation organized under the Nevada statutes which owns and operates a community antenna system in Wells, Nevada.

The Complaint in No. 1814, filed on March 24, 1966, invoked jurisdiction of this Court under 28 U.S.C. 1331, 2281 and 2284. It alleges that the defendants, Commissioners of the Public Service Commission of the State of Nevada, have interpreted Chapter 704 of the Nevada Revised Statutes to authorize regulation of community antenna systems as public utilities. The plaintiff contends any such regulation would contravene the due process clause of the Fourteenth Amendment and the Commerce Clause of the Constitution and that the Federal Government has pre-empted the states in the regulation of such operations. The Complaint seeks a preliminary and final injunction prohibiting the defendants from investigating, taking jurisdiction, or imposing any regulation pursuant to Chapter 704 of the Nevada Revised Statutes.

On April 19, 1966, the Nevada Public Service Commission issued an order to TV Pix, Inc. to appear and show cause why its operation in Elko should not be included within the purview of N.R.S. 704.020 as a "public utility", thereby requiring a certificate of public convenience and necessity under N.R.S. 704.330 (1). Similar orders were directed to TV Pix, Inc. on April 20, 1966, concerning its operation in Carson City and Stateline. On the latter date, an order was also directed to Wells TV, Inc. to show cause why its operations should not be similarly regulated.

The Complaint in No. 1827 was filed on May 10, 1966, alleging the same grounds for relief as that in No. 1814. A temporary restraining order was then issued on May 10, 1966.

This three-judge court was impaneled, and on September 30, 1966, heard motions for a preliminary injunction and for dismissal.

Although the jurisdiction of a federal court may have been properly invoked, the Courts often abstain from its exercise. Perhaps to create order out of chaos, the commentators have classified the abstention cases into two broad categories. Cf. 1 Barron & Holtzoff, Wright, Ed., Section 64. On the one hand, we have the *Pullman* type cases wherein state action is being challenged in the federal court as contrary to the federal constitution, and there are unsettled questions of state law which may be dispositive of the case. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496. On the other hand, we have the *Burford* type cases wherein the federal court refrains from exercising jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs. *Burford v. Sun Oil Co.*, 319 U.S. 315. The present actions present problems in both areas of abstention.

In *Pullman*, the company sought to enjoin enforcement of an order of the Texas Commission. In addition to the federal constitutional issue raised, there was an unsettled question under state law of whether the Commission had the power to make its order. Although the district court had jurisdiction of the suit, the Supreme Court held it should have remanded the case to the

state court for a determination of the state issues. The rationale of *Pullman* is to avoid a premature determination of a federal constitutional issue which may not survive state litigation. So long as there is adequate state review to decide the state issue, the federal court should abstain. See *Chicago v. Fieldcrest Dairies, Inc.*, 316 U.S. 168; *Harrison v. N.A.A.C.P.*, 360 U.S. 167; *Green v. Phillips Petroleum*, 119 F. 2d 466.

Here, as in *Pullman*, "a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." *Pullman*, supra, at 500. The defendants are attempting to bring the plaintiffs within the language of N.R.S. 704.020 which defines a public utility as "Any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricity. *The provisions of this paragraph do not apply to interstate commerce.*" [Emphasis added.] N.R.S. §704.020 (d).

The plaintiffs attack the interpretation on federal constitutional grounds. There are, however, many state questions to be resolved. If the statutory exclusion of interstate commerce is given a broad interpretation by the state courts, the difficult questions of infringement of state action upon federal constitutional prohibitions may never be reached. *Bonanza Air Lines, Inc. v. Public Comm. of Nevada*, 1960, 186 F. Supp. 674.

There is an adequate procedure in the state courts to have these questions decided. If the defendants determine that the plaintiffs are within the purview of N.R.S. 704.020(d), they will then issue an order re-

quiring the plaintiffs to cease and desist operations until a certificate of public convenience and necessity is issued. N.R.S. 704.380(4). The plaintiffs may then bring an action in the state district court to have the order of the Commission vacated or set aside. N.R.S. 704.540. An appeal is available from a decision in the state district court to the Supreme Court of the State of Nevada. N.R.S. 704.580. Since it is possible that the interpretation given by the state courts may be dispositive of the case, this Court will abstain from exercising jurisdiction.

The federal courts will also adopt a hands-off policy when the problem involves the administration by the state of its own affairs. Where state administrative action is challenged, the federal court will normally not intervene when there is an adequate state review procedure for the protection of federal rights. *Burford v. Sun Oil Co.*, 319 U.S. 315; *Alabama Public Service Comm. v. Southern Railway Co.*, 341 U.S. 341. The Courts will not meddle in a state's administrative affairs. See also: *Audiocasting, Inc. v. State of Louisiana*, 143 F. Supp. 922.

Particularly persuasive is *Public Service Commission of Utah v. Wycoff, Inc.*, 344 U.S. 237. In that case, the respondent sued the Commission in the Federal District Court. The company sought (1) a declaratory judgment that its activities were in interstate commerce, and (2) an injunction against the Commission interfering with its activities. At the time of the suit, there was no decision of the Commission to interfere with the company's activities. The company merely

alleged a threat of such action. The Supreme Court ordered dismissal in the following language:

> "Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. Cf. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41; Eccles v. Peoples Bank, 333 U.S. 426. See Colegrove v. Green, 328 U.S. 549. Responsibility for effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts.
>
> "But, as the declaratory proceeding is here invoked, it is even less appropriate because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship. The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration which either is intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.
>
> "Declaratory proceedings in the federal courts against state officials must be decided with regard for implications of our federal system. *State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary*

> *right to take evidence and make findings of fact.* It is the state courts which have the first and last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. Alabama State Federation of Labor v. McAdory, 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be res judicata, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights." [Emphasis added.] *Wycoff*, supra, at 246, 247.

In the cause before this Court, there has been no decision by the defendants to regulate the plaintiffs. The only action of the Commission is an order to show cause why the plaintiffs should not be regulated, i.e., the Commission has simply ordered a hearing. To reach the federal question involved, we would have to assume that the State has chosen to regulate. In substance, the plaintiff is asking this Court to enjoin the State from making a final choice. We think that such meddling in the administrative affairs of the State of Nevada would be a clear violation of the *Burford* doctrine. There is sufficient state judicial review available from any order the Commission may make. Cf. N.R.S. 704.540, 704.580, supra.

The motions for preliminary injunction are denied and the actions are dismissed.

/s/ CHARLES M. MERRILL
CIRCUIT JUDGE

/s/ ROGER D. FOLEY
DISTRICT JUDGE

/s/ BRUCE R. THOMPSON
DISTRICT JUDGE

APPENDIX B

This appendix consists of excerpts from the Nevada Revised Statutes, a general order directed to all community antenna TV companies dated February 1, 1966; and an Order to Show Cause directed to TV Pix, dated April 19, 1966. Similar orders were directed to Wells TV, Inc., and to plaintiffs' systems in Carson City and Tahoe.

Nevada Revised Statute

708.150 · *General Duties of Commission.*

The commission shall supervise and regulate the operation and maintenance of public utilities, as named and defined in chapter 704 of NRS, in conformity with the provisions of chapter 704 of NRS.

704.020 *"Public Utility" defined.*

1. As used in this chapter, "public utility" shall mean and embrace:

. . .

(d) . . . any plant, property, or facility furnishing facilities to the public for the transmission of intelligence via electricity. The provisions of this paragraph do not apply to interstate commerce.

BEFORE THE PUBLIC SERVICE COMMISSION OF NEVADA

Case No. 1530

In the Matter of an Investigation on the Commission's own motion into the operations and practices of TV

PIX, INC., ELKO, NEVADA, which serves Community Antenna Television to the Elko area to determine whether or not they are an intrastate or interstate operation

At a general session of the Public Service Commission of Nevada, held at its offices in Carson City, Nevada, April 11, 1966

PRESENT: Chairman J. G. Allard
Commissoiner Noel A. Clark
Commissioner Leslie W. Carlson
Secretary William E. Mooney
Assistant Secretary Cora Austin

ORDER TO SHOW CAUSE

IT APPEARING That the Public Service Commission of Nevada is advised and by its own knowledge has reason to believe that TV PIX, INC., has operated and continues to maintain and operate a community antenna television service in and near the vicinity of Elko, County of Elko, Nevada,

IT FURTHER APPEARING That Nevada Revised Statue 704.020 1. (d) "Public Utility" defined reads: "Any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricity. The provisions of this paragraph do not apply to interstate commerce."

IT FURTHER APPEARING That NRS 704.020 b. (b) reads: "The commission (Public Service Commission of Nevada) is hereby invested with full power of supervision, regulation and control of all such utilities subject to the provisions of this chapter and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipility, town or village, unless otherwise provided by law."

IT FURTHER APPEARING That NRS 704.330 1. reads: "Every public utility owning, controlling, operating or maintaining or having any contemplation of owning, controlling or operating any public utility shall, before beginning such operation or continuing operations or construction of any line, plant or system or any extension of a line, plant or system within this state, obtain from the commission (Public Service Commission of Nevada) a certificate that the present or future public convenience or necessity requires or will require such continued operation or commencement of operations or construction."

IT FURTHER APPEARING That said TV PIX, INC., has not made application for a certificate, and further states that it denies the jurisdiction of the Public Service Commission over its operations in community antenna television operations, and therefore does not intend to make such application therefor; and

IT FURTHER APPEARING That the Attorney General of Nevada in Opinion No. 128 states that such community antenna television operation comes within the purview of public utilities as defined in NRS 704.020; and

NOW, THEREFORE IT IS ORDERED by this Commission, pursuant to authority granted under NRS 704.330 4., and upon its own motion, that TV PIX, INC., by its duly authorized representatives, shall appear before the Commission:

Nye Building
201 South Fall Street
Conference Room No. 1
9:30 A.M.
Tuesday, May 10, 1966

and show cause, if any there be, why the Commission should not order it in pursuance of NRS 706.220 to cease and desist in operating and offering such service to the public in the manner of a public utility engaged in intrastate commerce within the State of Nevada as

hereinabove set out, until properly authorized by this Commission.

LESLIE W. CARLSON, Commissioner
BY THE COMMISSION,
/s/ Leslie W. Carlson

Attest:
/s/ William E. Mooney
WILLIAM E. MOONEY, Secretary
Dated: Carson City, Nevada
April 19, 1966

(SEAL)

PUBLIC SERVICE COMMISSION
STATE OF NEVADA

February 1, 1965

TO ALL COMMUNITY ANTENNA TV COMPANIES:

Please be advised that pursuant to N.R.S. 704.020, Paragraph 1(d):

> "Any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricty. The provisions of this paragraph do not apply to interstate commerce."

Subsequent to a long study by this Commission, on September 17, 1964 in a duly constituted meeting of the Public Service Commission of Nevada it was unanimously passed, that this Commission would take active jurisdiction of Community Antenna TV Companies on rates, facilities and services.

Further, that each supplies of said services in the State of Nevada make application to the Commission for a certificate of public convenience and necessity pursuant to N.R.S. 704.330.

Therefore, you are respectively requested to complete the enclosed forms and return them to this Commission within thirty (30) days from receipt of same.

Applications are to be completed according to all statutory provisions and approved Rules of Practice and Procedure of this Commission.

A separate application must be submitted for each area the company desires to serve.

Handbooks may be obtained by writing the Nevada Public Service Commission and requesting Bulletin No. 1 which covers 704, inclusively, for the sum of $1.50 or the Rules of Practice and Procedure before the Commission for $1.00.

Should you have any questions please feel free to call upon us.

Very truly yours,

PUBLIC SERVICE COMMISSION
OF NEVADA

LESLIE W. CARLSON, Commissioner

PUBLIC SERVICE COMMISSION
STATE OF NEVADA

December 9, 1965

George M. McMillan, Esq.
Attorney at Law
1020 Kearns Building
Salt Lake City 1, Utah

Re: CATV Stations - Wells, Elko, Carson City, and Tahoe

Gentlemen:

The Commission, for many months, has been studying its jurisdiction on community antenna facilities.

NRS 704.020 Public Utilities Defined, paragraph (d) states, "Any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricity. The provisions of this paragraph do not apply to interstate commerce."

The Attorney General's opinion dated April 22, 1964, Opinion No. 128, indicates that all intrastate community antenna operations are subject to the jurisdiction of the Public Service Commission of Nevada. Therefore, it becomes mandatory at this time that you fill in the enclosed applications, returning an original and three copies, with all exhibits, in conformance with NRS 704.330 and Rule No. 14.1 of the Commission's Rules of Practice and Procedure. Bulletins on NRS 704, inclusive, and Rules of Practice and Procedure are available in both the Carson City office and the Las Vegas office of the Public Service Commission. Therefore, we request the enclosed applications be completed, an original and three (3) copies, within thirty (30) days.

The office will ask the Attorney General to take whatever legal steps are necessary should any operating Community Antenna Company fail to file an application for a certificate of public convenience and necessity, as described in NRS 704.330, within thirty days from the receipt of this letter.

Very truly yours,

PUBLIC SERVICE COMMISSION
OF NEVADA

LESLIE W. CARLSON, Commissioner

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 17 1967
JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. ~~1224~~ 79

TV PIX, INC. AND WELLS TV, INC., *Appellants,*

vs.

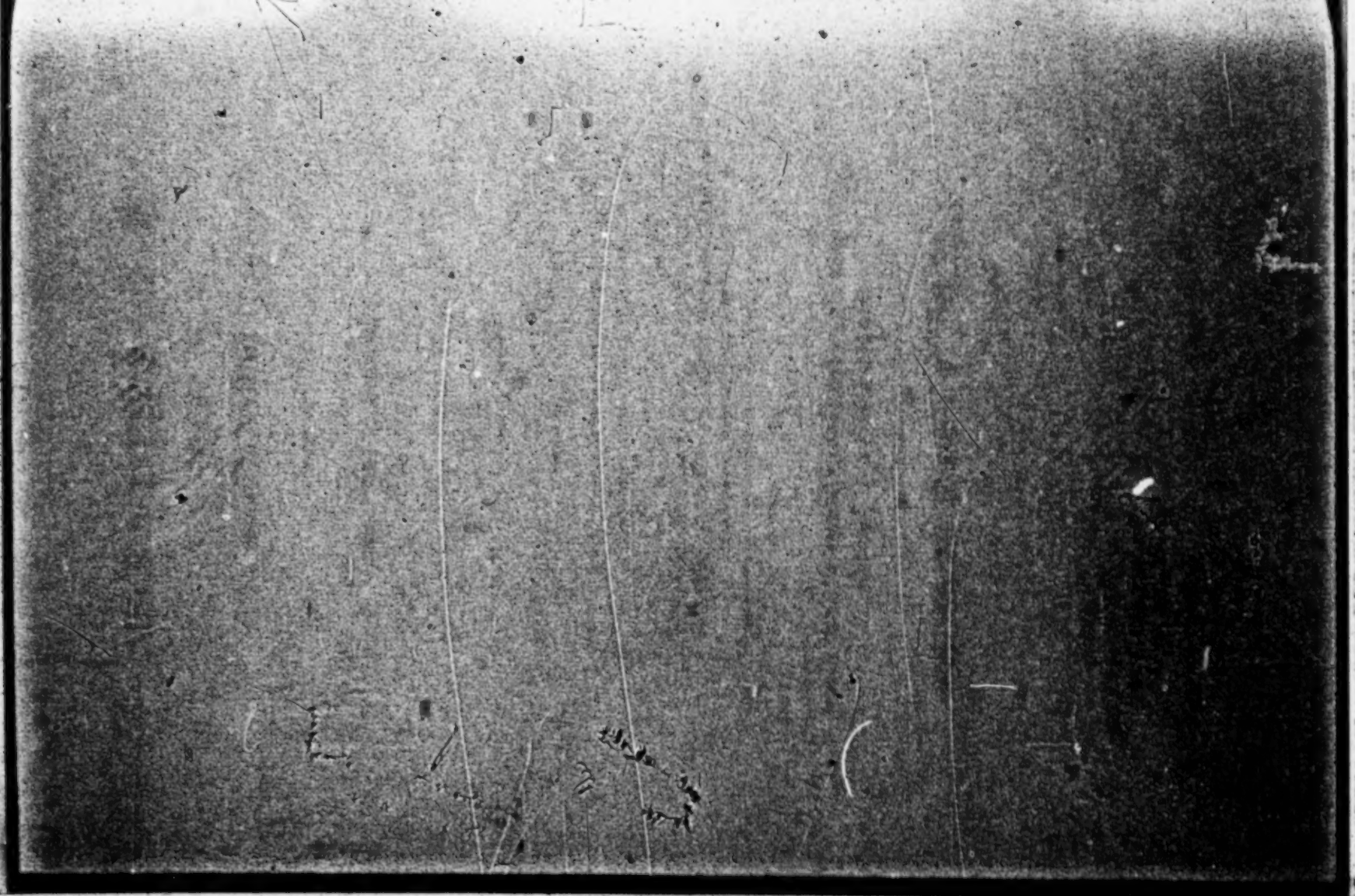
J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEVADA, *Appellees.*

On Appeal from the United States District Court for the District of Nevada

MOTION TO DISMISS OR AFFIRM

HARVEY DICKERSON
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada

Attorney for Appellees.



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HARVEY DICKERSON
Attorney General of Nevada
Supreme Court Building
Carson City, Nevada

Attorney for Appellees.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No.....

TV PIX, INC. AND WELLS TV, INC., *Appellants*,

vs.

J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEVADA, *Appellees*.

On Appeal from the United States District Court for the District of Nevada

MOTION TO DISMISS OR AFFIRM

Appellees respectfully move the Court to dismiss the appeal herein, or to affirm the judgment sought to be reviewed on the appeal on the following grounds:

1. No substantial federal question is presented by the appeal.

2. That it is manifest that the questions on which the appeal depends are so unsubstantial as not to need further argument.

3. That appellants failed to exhaust their state remedies, either administrative or judicial, before instituting the action below in the United States District Court.

4. That all the service and functions indulged in by appellants are rendered to all their subscribers within the State of Nevada, and are therefore *intrastate* commerce solely within the jurisdiction of the administrative departments and courts of this State. It follows, therefore, that the lower court was without jurisdiction to hear the cause or impanel a three-judge court.

RESPECTFULLY SUBMITTED this 15th day of May, 1967.

HARVEY DICKERSON
Attorney General of Nevada

Attorney for Appellees.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT OF THREE-JUDGE FEDERAL DISTRICT COURT

STATEMENT OF THE CASE

This matter consists of two cases, filed by two corporate plaintiffs, both of which, at all times mentioned herein, were organized and existing under the laws of the State of Nevada. The relief sought in both cases was the same. Therefore, for the sake of brevity and convenience we shall refer to the appellants as "plaintiffs" as though they were both in one action.

Beginning in 1956 the plaintiffs began the operation of community antenna television systems in the cities of Wells, Nevada and Elko, Nevada. Later a similar service was begun in Carson City, Nevada. No federal or state license or permit was ever asked for or obtained.

The function of the systems is to pick up television signals from Nevada stations and by the use of wires or cables attached to telephone poles in each city in which the system functions, transmit these signals into the homes of subscribers. The service requires a cable installation in the residence of each subscriber for which greatly varying fees have been charged.

No Nevada statute required state public utility regulation until 1963. However, after continued complaints of poor service and excessive charges, the Nevada Legislature in 1963 enacted an amendment to the Nevada Public Service Act, NRS 704.020, 1(d) which provides as follows:

> "Public utility is defined as any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricity. The provisions of this paragraph do not apply to interstate commerce."

Pursuant to this statute, and because of further numerous complaints from subscribers to the system, the Nevada Public Service Commission issued its order to appellants to appear and show cause why the said commission should not order appellants to cease and desist offering a public utility service until properly authorized to do so by said commission.

Appellants ignored said order to show cause and commenced an action in the United States District Court for the District of Nevada in which a declaratory judgment was sought, and also an injunction restraining the Nevada Public Service Commission from enforcing said statute on the ground that said statute was in violation of the Interstate Commerce Clause, the Supremacy Clause and the Fourteenth Amendment of the United States Constitution.

A three-judge Federal Court was convened on motion of appellants, over appellees' opposition, under 28 U.S.C.A. 2281. A hearing was held on appellants' request for an injunction and declaratory relief, after which the three-judge court denied the requested relief and ordered the complaints dismissed. A copy of the court's decision and order is marked Exhibit "A", attached hereto and made a part hereof.

Appellants subsequently filed a "motion for a new trial" and a "motion to amend the judgment", both of which motions were denied by said three-judge court. The appellants have appealed from the order denying the requested relief and dismissing the actions.

STATEMENT OF JURISDICTION

The court has jurisdiction to hear motions to dismiss appeals or affirm the judgment of the three-judge court under Rule 7 of the Supreme Court Rules, and the Court has jurisdiction of the appeal under 28 U.S.C.A. Section 1253.

QUESTION PRESENTED

Notwithstanding the complex and numerous questions set forth on page 3 of appellants' brief filed in this Court, there is in all reality but one question to be considered. That is:

> Did the three-judge district court err when it denied appellants the relief sought and dismissed their complaint?

AUTHORITIES AND ARGUMENT

As we repeatedly stated in the lower court, neither the Congress nor the Federal Communications Commission has pre-empted or threatened to pre-empt the community antennae television field as to state certification of the service territory and as regulation of rates to subscribers and the quality of service furnished in connection therewith.

The federal and state regulatory objectives are distinct and compatible. The Federal Communications Commission seeks to regulate the television program market, while the state commissions seek only to regulate the rates, services and operating territory of community antennae television companies.

The Federal Communications Commission properly has, as a matter of course and proper regulation in the federal sphere, the authority to adopt rules for the conduct and operation of community antennae systems in order to prevent interference with television signals and programming. Further than that the commission has refused to go. As proof of this statement, we respectfully refer to rules adopted, as announced on February 15, 1966, as set forth in the commission's Second Report and Order in Dockets 14895, 15233 and 15971—FCC 66-220 issued March 8, 1966.

In paragraph numbered 9, and entitled "Legislative Proposals", subparagraph 3, the commission asked Congress to:

"(3) *provide for no Federal pre-emption except to the extent of direct conflict with the provisions of the communications act or regulations of the Commission.* The Commission also requested Congress to consider the appropriate relationship of Federal to State-local jurisdiction over CATV systems *(particularly with regard to initial franchising, rate regulation and related matters)* . . ."
(Emphasis added.)

It is interesting to note that, although appellants contend state regulation would violate their federal constitutional rights, they have not sought federal authority, but, as the record shows, have voluntarily accepted and are now operating under public utility type franchises granted by Nevada municipalities. The Nevada Public Service Commission, pursuant to a legislative mandate, seeks only to prevent an uneconomic duplication of facilities and to protect the public from exorbitant rates and substandard degraded service by proper regulation as is done with every other public utility in Nevada.

I.

The Provisions of the Fourteenth Amendment Do Not Immunize the Appellants From the Application of the Nevada Public Service Statutes

Appellants contend that the Nevada regulatory program offends the guarantees of the Fourteenth Amendment. This is clearly erroneous. For example, in *86 C.J.S.*, page 88, Sec. 74, it is stated:

"Because of the quasi-public nature of the business, like every other public utility, . . . one engaged in the business of furnishing telegraph or telephone service to the public, or any other business involving the transmission of intelligence by electricity as ticker or market quotation service,

> electric burglar or fire alarm service, . . . or wireless telegraph service or radio broadcasting, . . . is subject to control and regulation by public authority for the common good, not only as to the public safety, security, and convenience, but also as to charges and discriminations . . ."

The CATV systems are endowed with the monopolistic characteristics of other utilities because of their cable distribution facilities which are similar to those of electric and telephone companies. These distribution facilities require the use of the public streets and highways. It is not economically feasible for CATV companies to construct two or more distribution systems over the same streets. In instances where a single unregulated CATV company serves the public, it is free to "charge what the traffic will bear."

The posture of the appellants in challenging the state regulatory program is inconsistent with their voluntary assumption of obligations imposed by the Carson City, Elko and Wells franchises and the utility pole attachment agreements.

The public utility type franchises granted by the Nevada municipalities, authorizing the use of the streets within a certain territory, are analogous to the certificates of public convenience and necessity specified by state law.

The construction and operation standards prescribed by the franchises and pole attachment agreements are analogous to the service and safety requirements of state law.

The gross receipts payments prescribed by the franchises are similar to the annual assessments required by state law.

The financial disclosure requirements of the franchises are analogous to the annual reports prescribed by state law.

In addition, the franchises and pole attachment agreements have imposed various surety and indemnification obligations upon the plaintiffs.

In essence, many of the obligations imposed by the state regulatory program have already been voluntarily assumed by the plaintiffs. However, there is one significant difference—the plaintiffs have not yet been placed under effective rate regulation. The plaintiffs are now free to earn in excess of a reasonable rate of return. We do not blame them for wanting to continue to do so.

But, the people of Nevada, through their legislative representatives, have decided that lack of effective regulation is adverse to the public interest. We believe this decision is reasonable.

Otherwise, the CATV companies could operate their distribution systems in the public streets and at the same time charge exorbitant rates to members of the public, render degraded service and discriminate against individuals on an arbitrary basis.

Another indication of the "no pre-emption" construction is found in FCC's statement to subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce on May 28, 1965 regarding H.R. 7715 which was entitled "A bill to amend the Communications Act of 1934 to establish a national television policy and to provide a method by which rules of the Federal Communications Commission with regard to community antennae television systems may be reviewed by the Congress before they become effective."

The FCC, speaking through its then Chairman, E. William Henry, criticized Section 398 of H.R. 7715 in the following terms:

> "Section 398 states that 'it is necessary for the Federal Government to regulate those aspects of intrastate and local television communications which may affect the accomplishment of the purpose of this part and that such regulation should be the exclusive concern of the Federal Government.' Since the purpose is stated so broadly—to make available TV programs as widely as possible—it could be argued that

the entire field is pre-empted. *The Commission does not contemplate regulation of such matters as CATV rates to subscribers, the extent of the service to be provided, or the award of CATV franchises.* These are all matters which we believe are better left to regulation on the state or local level. If section 398 is intended to pre-empt or looks toward pre-emption which would oust the local entities from regulation of such matters, we believe that its enactment would be inadvisable. For in that event, neither the Commission, in view of the amendment to subsection (h) specifying that a CATV system shall not be deemed a common carrier, nor any other body would have authority over the CATV system's rates or extension of service. *These important aspects of the public interest would simply be left unprotected.* We think, therefore, that the bill or its legislative history should make clear that neither section 398 nor the amendment to subsection (h) would oust the state or local authorities of jurisdiction over such matters as rates or extensions of service." (Emphasis supplied.)

In the case of *Dispatch, Inc. vs City of Erie*, 249 Fed. Supp. 267, a summary judgment was subsequently vacated by the circuit court on the ground that the pleadings did not permit a summary judgment. There, as in the instant case, the plaintiff contended that the Federal Government had pre-empted the field, and that CATV was in the exclusive federal domain by specific pre-emption. The court flatly rejected that contention in the following language:

"Thus it is clear that there is no issue of any substance whatsoever in the allegation that the federal government has pre-empted this field. In fact, the Federal Communications Commission has from time to time said that it has not and will not occupy the field of CATV."

A little later in the decision quoted from the testimony of the

FCC Chairman in opposition to a house bill to extend the commission's jurisdiction to community systems is the following:

"*The commission does not contemplate regulation of such matters as CATV rates to subscribers, the extent of the service to be provided, or the award of CATV franchises.*" (Emphasis added.)

In the Erie case, the plaintiff also contended that the revenue proposed in the ordinance constituted an unconstitutional burden upon interstate commerce. The court answered this contention as follows:

"In the opinion of the court this proposition is without merit. * * * Interstate commerce is not involved in or with the ordinance. It does not infringe upon the interstate communications or commerce. * * * It is not a burden upon a television signal or any item passing in interstate commerce."

II.

There Is No Substantial Federal or Constitutional Question Involved In This Case

Appellants' operation is purely *intrastate*. Although the television programs viewed by appellants' subscribers have interstate status while being transmitted, the interstate journey has ended when the program is received by appellants' antennae; appellants do not rebroadcast such programs, but such programs merely flow through their cables to the television sets of their subscribers, all of whom are in the State of Nevada. This is similar to packaged merchandise shipped in interstate commerce to its destination where the original package is broken and the merchandise delivered to intrastate customers.

In 11 Am. Jur. at page 875, it is stated:

"Where the subject matter upon which the power is to be exercised is local and limited in its nature or sphere of

operation, the rule is well established that the several states may prescribe regulations until Congress intervenes."

As to the requirement of a substantial federal question, the court in *Acret vs Harwood*, 41 Fed. Supp. 492, at 495, in answer to a request for a three-judge court, said:

"The procedure which calls for the intervention of a three-judge court is extraordinary. It should not be invoked unless there is a substantial constitutional question. Jamesor & Co. v. Morgenthau, 1939, 307 U.S. 171, 172, 59 S.Ct. 804, 83 L.Ed. 1189. The right of the judge to whom the request is addressed, to deny it, when satisfied that the challenge to constitutional validity is unsubstantial, has been recognized by the highest courts, both under this statute and under the older statute, 28 U.S.C.A. § 380, which confined the action of such courts to cases seeking to restrain action under state law. See Ex parte Poresky, 1933, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152; California Water Service Co. v. Redding, 1938, 304 US 252, 58 S.Ct. 865, 82 L.Ed. 1323; Ex parte Bransford, 1940, 310 U.S. 354, 60 S.Ct. 947, 84 L.Ed. 1249; and see my opinion in Wylie v. State Board of Equalization, D.C. Cal. 1937, 21 F. Supp. 604; Rok v. Legg, D.C. Cal., 1939, 27 F. Supp. 243."

So also in *Hawks vs Hamill*, 288 U.S. 52, although the court was not concerned with the right to have a three-judge court convened, it was concerned with enjoining state officials from performing their official duties. In discussing the issue, the court said:

"Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such circumstances this court has said that an injunction ought not to be issued 'unless in a case reasonably free from doubt.' Massachusetts State Grange v. Benton, 272 U.S. 525, 527. The rule has been characterized as an 'important one', to

be 'very strictly observed.' 272 U.S. at 527, 529. Compare Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159; Cavanaugh v. Looney, 248 U.S. 453, 456."

So also in *Cavanaugh vs Looney*, 248 U.S. 453 at 456, a state statute was challenged as unconstitutional upon both federal and state grounds. A special court, assembled as provided by Sec. 266 Judicial Code, denied the injunction and the appeal to the U.S. Supreme Court followed. In affirming the lower court, the Supreme Court at page 456 said:

"But no such injunction 'ought to be granted unless in a case reasonably free from doubt,' and when necessary to prevent great and irreparable injury. Ex parte Young, supra, 166. The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable."

III.

Appellants Have Not Exhausted Their State Remedies, Either Administrative or Judicial

In *Cooper vs Hutchinson* (DC NJ), 88 Fed. Supp. 774, it was held that federal courts will abstain from using power to issue injunctions where there has been an allegation that a state statute is in conflict with the Federal Constitution or that a state officer is about to administer, or is administering a state statute, in an unconstitutional manner *until the highest court of the state has first passed upon the merits of the alleged constitutionality.*

In the last cited case, the court at page 782 of 88 Fed. Supp., stated the Rule of Federal Abstention as follows:

"The doctrine of abstention has been similarly applied where there has been an allegation that a state statute is in conflict with the United States Constitution or that a state officer is about to administer, or is administering, a state

statute in an unconstitutional manner. Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1724; C.I.O. v. McAdory, 325 U.S. 472, 65 S.Ct. 1395, 89 L.Ed. 1741; A. F. of L. v. Watson, 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873; Traffic Telephone Worker's Federation of N.J. v. Driscoll, D.C., 72 F. Supp. 499, appeal dismissed 332 U.S. 833, 68 S.Ct. 221, 92 L.Ed. 406. Cf. Hill v. Florida, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782. The reasoning in these cases has been based upon the premise that the highest court of the state should be permitted first to limit or pass upon the merits of the alleged unconstitutionality with recourse to the United States Supreme Court if the proper federal grounds are presented. Cf. Society of Good Neighbors v. Groat, D.C., 77 F. Supp. 695."

See also *Guerra vs Philadelphia* (DC Pa.), 30 Fed. Supp. 791.

In *Chicago Transit Co. vs Nims* (CA Mich.) 252 F.2d 317, it was held that if state courts had not authoritatively construed a state statute, a federal court ought not to pass on the question of constitutionality on basis of preliminary guesses "regarding the local law."

In *Phillips Petroleum Co. vs Jones* (DC Okl.) 147 Fed. Supp. 122, it was held that if the state statute is susceptible of construction which will avoid constitutional infringement, it is the compelling duty of the federal district court to accord to the state statute that construction, at least until the state courts have spoken.

In *Patterson vs Hardin* (DC Ind.), 145 Fed. Supp. 299, it was held that a federal district court had no jurisdiction to convene a three-judge district court or submit for issue and trial to the regular district court an action to enjoin enforcement of a state zoning statute based upon the contention that the Supreme Court of Indiana wrongly decided or misconstrued a section of such

statute, since the power to construe the state statute vested finally in the state court.

A holding that is especially in point in the instant case is found in *Howard vs Ladner* (DC Miss.). There the court held that federal courts will not assume, in advance of a decision by the state court of last resort, that the state court will place such a construction upon a statute as will render it obnoxious to the Federal Constitution. *Inter Longshoreman's Assn. vs Buttle*, 101 Fed. Supp. 650; *Wells vs Hand*, 238 Fed. Supp. 779; *C.I.O. vs Windsor*, 146 Fed. Supp. 214.

In the instant case, the appellants have two available state remedies, one administrative, the other judicial. Appellants allege that the Nevada Public Service Commission intends to and will require them to conform to the state statute herein challenged. This will most probably be by way of an order to show cause before said commission why appellants shouldn't comply with said statute. At that time, appellants may present all the contentions they are attempting to present to this Court. No one may assume that the commission will make an erroneous decision. For NRS 52.070, subsection 15 provides that there is a presumption: "That official duty has been regularly performed."

In the event that the Public Service Commission should decide adversely to appellants' contentions, appellants, by reason of the provisions of NRS 704.540, are accorded ample provision for a judicial review of the adverse action by the commission; and NRS 704.550 grants the appellants the right to enjoin the commission's decision and order pendente lite. Also, NRS 704.580 gives appellants the right to appeal to the Nevada Supreme Court, should the district court's decision be adverse.

Thus it is patently clear that appellants' allegation in paragraph 11 of their complaint that: "Plaintiff has no adequate legal

remedy," like most all of their allegations, is clearly erroneous and not in accord with the law or facts.

In *Alabama Pub. Serv. Comm. vs Southern Ry. Co.*, 341 U.S. 341, a three-judge federal district court had enjoined the enforcement of an order of the Alabama Public Service Commission. The commission appealed to the U.S. Supreme Court, and that Court reversed the district court on the ground that the railway company had failed to exhaust its state remedies, both administrative and judicial. In reversing, the Court, inter alia, said (p. 348):

> "Not only has Alabama established its Public Service Commission to pass upon a proposed discontinuance of intrastate transportation service, but it has also provided for appeal from any final order of the commission to the circuit court of Montgomery County as a matter of right. Ala. Code 1940, Title 48, § 79. That court, after a hearing on the record certified by the commission, is empowered to set aside any commission order found to be contrary to the substantial weight of the evidence or erroneous as a matter of law, id. § 82, and its decision may be appealed to the Alabama Supreme Court, id. § 90. Statutory appeal from an order of the commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, are 'supervisory in character.' Avery Freight Lines, Inc. v. White, 245 Ala. 618, 622–623; 18 So.2d 394, 398 (1944). The supreme court of Alabama has held that it will review an order of the commission as if appealed directly to it. Alabama Public Service Commission v. Nunis, 252 Ala. 30, 34, 39 So.2d 409, 412 (1949), and that judicial review calls for an independent judgment as to both law and facts when a denial of due process is asserted. Alabama Public Service Commission v. Southern Bell Tel. & Tel. Co., 253 Ala. 1, 11–12, 42 So.2d 635, 662 (1949).
>
> "The fact that review in the Alabama courts is limited to

the record taken before the commission presents no constitutional infirmity. Washington ex rel. Oregon R. & N. Co. v. Fairchild, 224 U.S. 510 (1912). And, whatever the scope of review of commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. New York v. United States, 331 U.S. 284, 334–336 (1947); Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U.S. 570, 576 (1941). Appellee complains of irreparable injury resulting from the commission order pending judicial review, but has not invoked the protective powers of the Alabama courts to direct the stay or supersedeas of a commission order pending appeal. Ala. Code, 1940, Tit. 48, § 81, 84. Appellee has not shown that the Alabama procedure for review of commission orders is in any way inadequate to preserve for ultimate review in this Court any federal questions arising out of such orders.

"An adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts. Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U.S. 570, 577 (1941); Railroad Commission of Texas v. Rowan &

Nichols Oil Co., 310 U.S. 573, as amended, 311 U.S. 614, 615 (1940)."

It is interesting to note that in the Alabama act on an appeal to the courts, the appellant was confined to the record; whereas, in Nevada the appeal is virtually a trial de novo. (NRS 704:-560).

In the instant case, the record shows that appellants have sought no relief by way of state remedies, either administrative or judicial.

It is most important to note that the appellants allege only that appellees only "*threaten*" to impose the state law upon appellants. A mere threat or danger that a state law alleged to be unconstitutional *may be* invoked is not sufficient to give a three-judge court jurisdiction.

Watson vs Buck, 313 U.S. 387;
Dalton Adding Mach. Co. vs Corp. Comm. of Mass., 236 U.S. 699;
Piccoli vs Bd. of Trustees et al, 87 Fed. Supp. 672;
Wilder vs Reno, 43 Fed. 727;
Chicago etc. Transit Co. vs Nims, 252 Fed.2d 317;
Texas Co. vs Montgomery, 73 Fed. Supp. 527, affirmed 322 U.S. 827.

CONCLUSION

It seems patently clear from all the foregoing that the questions involved in this appeal are so unsubstantial as not to require or need any further argument. Further in this connection, the decisions of this Honorable Court sustain appellees' right to an affirmance or a dismissal.

RESPECTFULLY SUBMITTED this 15th day of May, 1967.

HARVEY DICKERSON
Attorney General of Nevada

Attorney for Appellees.

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

No. 1814

TV PIX, INC., *Plaintiff*, vs. J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEVADA, *Defendants*.

No. 1827

WELLS TV, INC., A CORPORATION, *Plaintiff*, vs. J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEVADA, *Defendants*.

Before MERRILL, Circuit Judge, and FOLEY and THOMPSON, District Judges

Per Curiam:

Plaintiff in No. 1814 (TV PIX, INC.) is a corporation organized under the laws of the State of Nevada. It owns and operates community antenna systems in Elko, Carson City and Stateline, Nevada. Plaintiff in No. 1827 (Wells TV, Inc.) is also a corporation organized under the Nevada statutes which owns and operates a community antenna system in Wells, Nevada.

The Complaint in No. 1814, filed on March 24, 1966, invoked jurisdiction of this Court under 28 U.S.C. 1331, 2281 and 2284. It alleges that the defendants, Commissioners of the Public Service Commission of the State of Nevada, have interpreted Chapter 704 of the Nevada Revised Statutes to authorize regulation of community antenna systems as public utilities. The plaintiff contends any such regulation would contravene the due process clause of the Fourteenth Amendment and the Commerce Clause of the Constitution and that the Federal Government has pre-empted the states in the regulation of such operations. The Complaint seeks a preliminary and final injunction prohibiting the defendants from investigating, taking jurisdiction, or imposing any regulation pursuant to Chapter 704 of the Nevada Revised Statutes.

On April 19, 1966, the Nevada Public Service Commission issued an order to TV Pix, Inc. to appear and show cause why its operation in Elko should not be declared within the purview of N.R.S. 704.020 as a "public utility", thereby requiring a certificate of public convenience and necessity under N.R.S. 704.330(1). Similar orders

were directed to TV Pix, Inc. on April 20, 1966, concerning its operation in Carson City and Stateline. On the latter date, an order was also directed to Wells TV, Inc. to show cause why its operations should not be similarly regulated.

The Complaint in No. 1827 was filed on May 10, 1966, alleging the same grounds for relief as that in No. 1814. A temporary restraining order was then issued on May 10, 1966.

This three-judge court was impaneled, and on September 30, 1966, heard motions for a preliminary injunction and for dismissal.

Although the jurisdiction of a federal court may have been properly invoked, the Courts often abstain from its exercise. Perhaps to create order out of chaos, the commentators have classified the abstention cases into two broad categories. Cf. 1 Barron & Holtzoff, Wright, Ed., Section 64. On the one hand, we have the *Pullman* type cases wherein state action is being challenged in the federal court as contrary to the federal constitution, and there are unsettled questions of state law which may be dispositive of the case. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496. On the other hand, we have the *Burford* type cases wherein the federal court refrains from exercising jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs. *Burford* v. *Sun Oil Co.*, 319 U.S. 315. The present actions present problems in both areas of abstention.

In *Pullman*, the company sought to enjoin enforcement of an order of the Texas Commission. In addition to the federal constitutional issue raised, there was an unsettled question under state law of whether the Commission had the power to make its order. Although the district court had jurisdiction of the suit, the Supreme Court held it should have remanded the case to the state court for a determination of the state issues. The rationale of *Pullman* is to avoid a premature determination of a federal constitutional issue which may not survive state litigation. So long as there is adequate state review to decide the state issue, the federal court should abstain. See *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U.S. 168; *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167; *Green* v. *Phillips Petroleum*, 119 F.2d. 466.

Here, as in *Pullman*, "a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." *Pullman*, supra, at 500. The defendants are attempting to bring the plaintiffs within the language of N.R.S. 704.020 which defines a public utility as "Any plant, property or facility furnishing facilities to the public for the transmission

of intelligence via electricity. *The provisions of this paragraph do not apply to interstate commerce.*" [Emphasis added.] N.R.S. § 704.-020(d).

The plaintiffs attack the interpretation on federal constitutional grounds. There are, however, many state questions to be resolved. If the statutory exclusion of interstate commerce is given a broad interpretation by the state courts, the difficult questions of infringement of state action upon federal constitutional prohibitions may never be reached. *Bonanza Air Lines, Inc. v. Public Service Comm. of Nevada*, 1960, 186 F. Supp. 674.

There is an adequate procedure in the state courts to have these questions decided. If the defendants determine that the plaintiffs are within the purview of N.R.S. 704.020(d), they will then issue an order requiring the plaintiffs to cease and desist operations until a certificate of public convenience and necessity is issued. N.R.S. 704.330(4). The plaintiffs may then bring an action in the state district court to have the order of the Commission vacated or set aside. N.R.S. 704.540. An appeal is available from a decision in the state district court to the Supreme Court of the State of Nevada. N.R.S. 704.580. Since it is possible that the interpretation given by the state courts may be dispositive of the case, this Court will abstain from exercising jurisdiction.

The federal courts will also adopt a hands-off policy when the problem involves the administration by the state of its own affairs. Where state administrative action is challenged, the federal court will normally not intervene when there is an adequate state review procedure for the protection of federal rights. *Burford v. Sun Oil Co.*, 319 U.S. 315; *Alabama Public Service Comm. v. Southern Railway Co.*, 341 U.S. 341. The Courts will not meddle in a state's administrative affairs. See also: *Audio casting, Inc. v. State of Louisiana*, 143 F. Supp. 922.

Particularly persuasive is *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237. In that case, the respondent sued the Commission in the Federal District Court. The company sought (1) a declaratory judgment that its activities were in interstate commerce, and (2) an injunction against the Commission interfering with its activities. At the time of the suit, there was no decision of the Commission to interfere with the company's activities. The company merely alleged a threat of such action. The Supreme Court ordered dismissal in the following language:

"Even where there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to pre-empt and

pre-judge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce, in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. Cf. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41; Eccles v. Peoples Bank, 333 U.S. 426. See Colegrove v. Green, 328 U.S. 549. Responsibility for effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts.

"But, as the declaratory proceeding is here invoked, it is even less appropriate because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship. The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration which either is intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.

"Declaratory proceedings in the federal courts against state officials must be decided with regard for implications of our federal system. *State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact.* It is the state courts which have the first and last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. Alabama State Federation of Labor v. McAdory, 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be res judicata, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights." [Emphasis added.] *Wycoff*, supra, at 246, 247.

In the cause before this Court, there has been no decision by the defendants to regulate the plaintiffs. The only action of the Commission is an order to show cause why the plaintiffs should not be regulated, i.e., the Commission has simply ordered a hearing. To reach the federal question involved, we would have to assume that the State has chosen to regulate. In substance, the plaintiff is asking this Court to enjoin the State from making a final choice. We think that such meddling in the administrative affairs of the State of Nevada would

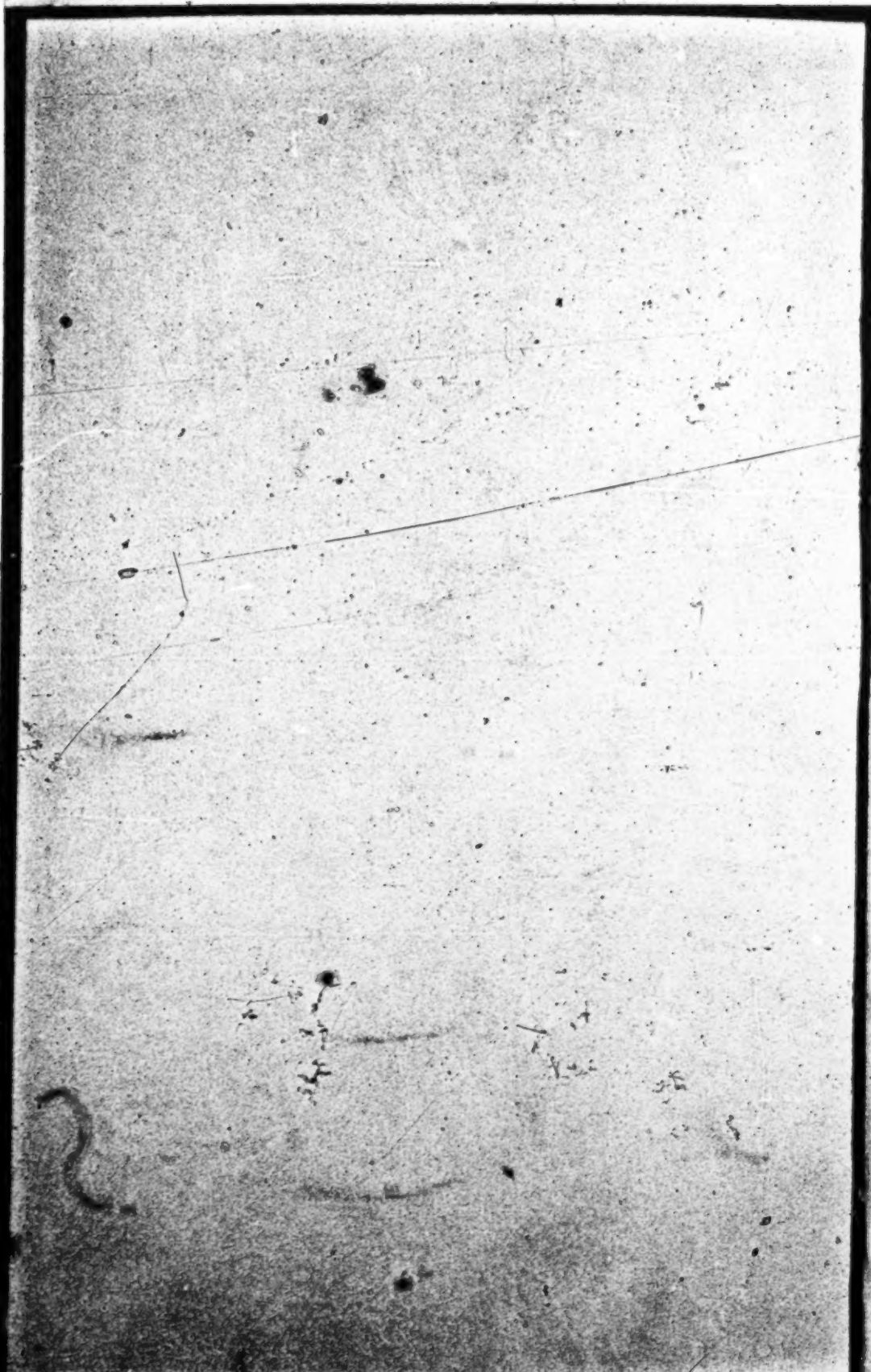
be a clear violation of the *Burford* doctrine. There is sufficient state judicial review available from any order the Commission may make. Cf. N.R.S. 704.540, 704.580, supra.

The motions for preliminary injunction are denied and the actions are dismissed.

/s/ CHARLES M. MERRILL
Circuit Judge

/s/ ROGER D. FOLEY
District Judge

/s/ BRUCE R. THOMPSON
District Judge



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In the Supreme Court of the United States

OCTOBER TERM 1966

No. ~~1964~~ 79

TV PIX, INC. and WELLS TV, INC.,
Appellants,

v.

J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, Commissioners of the Public Service Commission of the State of Nevada,
Appellees.

On Appeal from the United States District Court for the District of Nevada

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM
MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

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In the Supreme Court of the United States

OCTOBER TERM 1966

No. 1224

TV PIX, INC. and WELLS TV, INC.,
Appellants,
v.
J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, Commissioners of the Public Service Commission of the State of Nevada,
Appellees.

On Appeal from the United States District Court for the District of Nevada

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM
MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

AUTHORITY FOR FILING

This brief is filed pursuant to the provisions of Rule 16(3) of the Rules of this court. The Appellees' "Motion to Dismiss or Affirm" was received by counsel for the Appellants on May 16, 1967.

POINT I.

APPELLEES STATE NO GROUNDS UPON WHICH TO DISMISS THE APPEAL.

Rule 16(1)(a) of the Rules of this court provides that:

> "The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court because not taken in conformity to statute or to these rules."

The State of Nevada concedes in the last paragraph on page 8 of the "Motion to Dismiss or Affirm" that: "The court has jurisdiction of the appeal under 28 USCA Sec. 1253."

No contention is made by the State of Nevada that the appeal is not taken in conformity with the statute or with the rules of the court. It is submitted, therefore, that no Motion to Dismiss lies, and insofar as the Appellees' pleading purports to be a Motion to Dismiss, that such characterization is a misnomer.

POINT II.

THE MOTION TO AFFIRM SHOULD BE DENIED BECAUSE SUBSTANTIAL QUESTIONS REQUIRING ADDITIONAL ARGUMENT ARE PRESENTED.

A. *Appellees' "Statement of the Case" includes substantial misstatements of material facts.*

Appellees assert in the third paragraph of their "Statement of the Case" (Appellees' Motion to Dismiss or Affirm, p. 7), that:

> "The function of the [CATV] systems is to pick up television signals from the Nevada station and by use of wires or cables attached to telephone poles in each city in which the system

functions transmit these signals into the homes of subscribers."

This factual assertion is in direct contradiction to the Stipulation of Facts filed by the parties in the District Court. Appellants' CATV systems, in all the communities in question, pick up and deliver to their subscribers the signals of out of state stations. Paragraphs 5 and 6 of such Stipulation of Facts are as follows:

> "5. The community antenna systems in Elko and Wells deliver to their subscribers the signals broadcast by television stations KUTV, KCPX-TV and KSL-TV, Salt Lake City, Utah, from a transmitter located in the Oquirrh Mountains approximately 30 miles west of Salt Lake City. Station KUTV is affiliated with the National Broadcasting Company; station KSL-TV is affiliated with the Columbia Broadcasting Company; station KCPX-TV is affiliated with the American Broadcasting Company. The feature films and syndicated shows broadcast by KCPX-TV, KSL-TV and KUTV are generally interstate in nature and the advertisements on such stations relate to communications and services in interstate commerce.
>
> "6. TV Pix, Inc., plaintiff in No. 1814, delivers to its customers in Carson City and Stateline, the signals broadcast by KTVU, Oakland; KPIX, San Francisco; KVIE, Sacramento; KGO, San Francisco; KCRA, Sacramento; and KOVR, Sacramento. TV Pix, Inc. also delivers the signals of KOLO and KCRL, Reno, to its subscribers in Carson City and Stateline. Such Reno signals are picked up by said plaintiff within the State of Nevada for delivery to Carson City subscribers and in California for delivery to Stateline subscribers. The network affiliations of each of the stations delivered by said plaintiff

to its Carson City and Stateline subscribers are as follows: KPIX - San Francisco, Columbia Broadcasting System; KVIE - Sacramento, Educational Channel; KCRA - Sacramento, National Broadcasting Company; KTVU - Oakland, Independent; KOVR - Sacramento, American Broadcasting Company; KGO-TV - San Francisco, American Broadcasting Company; KOLO - Reno, Columbia Broadcasting System and National Broadcasting Company; KCRL - Reno, National Broadcasting Company and American Broadcasting Company."

In no known instance does a network television program or a syndicated program or feature film broadcast by the stations carried by plaintiffs' community antenna systems originate in the State of Nevada. Such programs generally originate in New York or Hollywood.

The record is clear that the signals of the Salt Lake City stations, broadcast in the state of Utah, are picked up by the Appellants TV Pix, Inc. and Wells TV, Inc. at a point within the State of Nevada and delivered to a common carrier microwave licensed by the Federal Communications Commission, transmitted by the common carrier from the point of delivery to the head-end of the Appellants' equipment at Wells and Elko, and there transmitted by a system of cables, wires and amplifiers to Appellants' subscribers.

Location of the equipment of Appellant TV Pix, Inc., utilized to pick up the California stations, is within the State of California. The signals are delivered in the State of California by TV Pix, Inc. to a common carrier microwave company and are transmitted by the

carrier to head-ends of the Appellants' systems in Carson City, Nevada, and South Tahoe, California. The system serving Tahoe, California and Stateline, Nevada is an integrated system served by one head-end. Thus, the instant case involves situations where the Appellants release to their subscribers the signals of out-of-state television stations broadcasting programs essentially interstate in origin, distribution and sponsorship.

The undisputed factual situation presented to the court is critical in determining whether the business activities of the Appellants constitute interstate commerce. The Federal Communications Commission has determined that community antenna systems constitute interstate communication by wire "since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber) —a chain which is now well established as interstate communication." Federal Communications Commission, Second Report and Order, Docket Nos. 14895, 15233 and 15971, 31 Fed. Reg. 4550.

Despite the citations in Appellants' Jurisdictional Statement, referring to the explicit decision of the FCC on this legal question, the State of Nevada persists in its unsupported conclusion that "Appellants' operation is purely intrastate." (Motion to Dismiss or Affirm, p. 14 et seq.) The factual premise upon which the Appellees' argument is predicated is wholly erroneous and the legal conclusion with respect to the interstate nature of the Appellants' business activities is directly

opposed to the determination of the federal communications expert, the Federal Communications Commission, and the rulings of two circuit courts of appeal. *cf. Idaho Microwave, Inc. v. FCC* (1965 CCA D.C.) 352 F(2d) 729; *Ward v. Northern Ohio Telephone Co.* (1962 CCA 6) 300 F(2d) 816, c. den. 371 U.S. 820, 9 L.Ed(2d) 61, 83 S. Ct. 37.

B. *The State of Nevada does not respond directly to Appellants' specific point asserting that a substantial question exists in the application of the abstention doctrine.*

The Jurisdictional Statement established that there was no unresolved state question, but that the only question involved in determining whether the state statute was applicable was whether Appellants' business activities constituted interstate commerce. (Jurisdictional Statement pp. 3, 7-11). Appellants pointed out: "Determination of whether specific conduct constitutes interstate commerce must be decided under the federal rule", (Jurisdictional Statement, pp. 7-8) and that the abstention cases authorize a District Court to defer for state adjudication all state questions but permit a reservation of the federal question by an express statement into the record in the state proceedings. (Authorities cited on pp. 8-9 of Jurisdictional Statement) Appellants suggest, therefore, that the three-judge panel misapplied the abstention doctrine.

This court held in *Turner v. Memphis* (1962) 369 U.S. 350, 7 L. Ed(2d) 762, 82 S. Ct. 805, that abstention is improperly applied in 28 USCA 2201 cases where there is no unresolved state issue to be passed

upon by a state court. The holding of *Turner* is in conflict with the language cited by the State of Nevada from *Cooper v. Hutchinson* (D. C. N.J. 1950) 88 F. Supp. 774, to the effect that a state court must first pass upon constitutional issues. Moreover, *Cooper* is not in point because jurisdiction there was under the Civil Rights Act of the United States, 8 USCA Sec. 43, and 28 USCA Sec. 1343.

Guerra v. City of Philadelphia (D. C. Pa. 1940) 30 F. Supp. 791, is not in point; the case was not brought under 28 USCA Sec. 2281. The District Court held that the amount in controversy did not involve the jurisdictional amount and the court held further that jurisdiction was denied by 28 USCA Sec. 41(1) as then in effect.

Chicago Transit Co. v. Nims (CCA 6, 1958), 252 F(2d) 317, was expressly distinguished by this court in *Idlewild Liquor Corporation v. Epstein* (1962) 370 U.S. 713, 8 L.Ed(2d) 794, 82 S. Ct. 1294, on the ground that in the *Chicago Transit* case the three-judge court "was requested only in the event that it should first be held that the state statute was by its term applicable to the plaintiff's business operations." In *Idlewild*, the court held that a three-judge court should have been convened because the complaint raised a substantial constitutional question and at least formally alleged a basis for equitable relief.

In *Phillips Petroleum Co. v. Jones* (D. C. Okla. 1955), 147 F. Supp. 122, a three-judge court was convened and ruled upon the issues presented by the plaintiff. The court held that the Oklahoma statute in ques-

tion was unconstitutional on its face, and since there had been no administrative rulings to raise a constitutional question " . . . our inquiry is at an end". *Phillips Petroleum* does not, therefore, support Appellees' position here.

Patterson v. Hardin (D. C. So. D. Ind., 1956), 145 F. Supp. 299, involved a situation where the plaintiffs sought to enjoin a state zoning statute. The decision holds that no substantial federal question was presented.

The District Court cases cited on page 18 of Appellees' Motion to Dismiss or Affirm are not in point because they involve situations where an adverse state ruling was only threatened. Here the defendants have admitted that they have made determinations that the Appellants' conduct constitutes intrastate commerce that they have jurisdiction to regulate Appellants' businesses, and that the Appellants should cease operations unless Appellees' demands are satisfied. Under the Nevada statute, the state rule is that the Appellees have "regularly performed" their duty. NRS 52.070.

Alabama Public Service Commission v. Southern Railway Co. (1951) 341 U.S. 341, 95 L. Ed. 1002, 71 S. Ct. 762, is inapposite. In that case there were unresolved state issues. In the instant case, the only unresolved issue was whether the Appellants' communications services constituted interstate commerce — a federal question. Appellants suggest that the arguments presented upon pages 7 through 11 of their Jurisdictional Statement with respect to the application of the abstention doctrine are not treated in any fashion

by the Appellees' Motion or the arguments in support of the Motion. The Appellees do not come to grips with the question as to whether abstention is properly applied where the only unresolved question involves the application of federal law. At no point in its Motion or argument does the State of Nevada suggest any unresolved state issue which should have been presented to a state court for determination.

The District Court placed emphasis upon the *Public Service Commission of Utah v. Wycoff* (1952) 344 U.S. 237, 97 L.Ed. 291, 73 S. Ct. 236. Appellants distinguish this case (pp. 9, 10 Jurisdictional Statement) on the ground that whereas in *Wycoff* the state agency had made no order raising a constitutional issue but was only considering the issuance of such an order, in the instant case, the defendants have, as state officers and acting under the state statute, determined that community antenna systems are subject to their jurisdiction. (See para. 9 plaintiffs' complaint, para. 10 defendants' answer; cf. pp. 5-6 Jurisdictional Statement). The State admits:

> "No one may assume that the [state] Commission will make an erroneous decision. For NRS 52.070, subsection 15 provides that there is a presumption: 'That official duty has been regularly performed.' "

Thus it is clear that unlike the situation in *Wycoff*, the defendants' rulings constitute an adjudication under state law that the state has the authority to regulate as public utilities Appellants' interstate communications facilities.

The Jurisdictional Statement points out that the

District Court dismissed the actions rather than staying proceedings while any purported state questions were being determined. In paragraph 1(c) of the Questions Presented portion of the statement, this action of the three-judge panel is challenged directly. (Jurisdictional Statement, p. 3). Appellees totally ignore the point in their Motion. Appellants submit that the question is deserving of additional consideration.

Since the Appellants filed their Jurisdictional Statement, the legislature of Nevada enacted a bill known as Assembly Bill #488. It was signed by the Governor of the State of Nevada April 20, 1967 and became law upon that date. Relevant excerpts are attached to this brief as Appendix A. The new statute expressly extends public utility regulation to community antenna television companies. It recites that "Upon investigation, the Legislature of the State of Nevada has determined that the rates, services and operations of community antenna television companies are affected with a public interest." (A. B. #488, Sec. 6.) In presenting the bill to Senate Judiciary Committee, two members of the State Public Service Commission appeared and stated that they viewed the bill as confirming their jurisdiction over community antenna systems. They stated that the Commission already had jurisdiction but that the bill clarified certain aspects of the law as it applied to details of regulation. Thus it is apparent that if there were, indeed, any unresolved state issues at the time of the decision of the three-judge panel, such questions have been settled by the legislative and executive branches of the state government. State policy fixing its determination to regulation

of community antenna systems is unmistakably clear. This court should take occasion to pass upon the serious and clearly presented constitutional issues in the exercise of its discretion and in view of the fact that the jurisdiction of the court to determine the matters presented upon appeal is conceded. See Appellees' "Statement of Jurisdiction", p. 8, Appellees' Motion to Dismiss or Affirm.

The state statute prevailing at this time and at the time of decision rendered by this court is controlling. *American Steel Foundries v. Tri-City C.T. Council* (1921) 257 U.S. 184, 66 L.Ed. 189, 42 S. Ct. 72; *Texas Co. v. Brown* (1922) 258 U.S. 466, 66 L. Ed. 721, 42 S. Ct. 375; *United States v. Alabama* (1960) 362 U.S. 602, 4 L. Ed (2d) 982, 80 S. Ct. 924. The new statute has the effect of placing even in clearer focus the constitutional questions presented by the Appellants' complaints and the record made at the hearing in the District Court.

In sum on this point, the determinations of the state agency prior to the filing of the complaint and during the pendency of the proceeding and the enactment of the new statute by the Legislature of Nevada during the pendency of this appeal demonstrate a considered state policy looking toward state public utility-type regulation of community antenna systems. State regulation not only is threatened, it is an accomplished fact unless enjoined by a court of competent jurisdiction. Jurisdiction of the trial court below was conceded in its opinion and jurisdiction of this court is conceded on appeal. No unresolved state questions

are suggested. The abstention doctrine, therefore, was improperly applied below and the decision of the trial court should be reversed. The circumstances of the case establish the necessity of full presentation to the court of the question of the application of the abstention doctrine where there are no state questions and in a case under Section 2281 where the constitutional issues are clearly presented and the District Court dismissed the complaint without a ruling on such issues.

C. *Substantial constitutional questions are presented on the merits.*

THE INTERSTATE COMMERCE ISSUE

The Appellees fail to respond directly to the Appellants' suggestion that a substantial question exists under the Interstate Commerce Clause. The interstate commerce issue is more than whether the proposed regulation of the State of Nevada constitutes an unreasonable burden in the usual sense; the question presented is whether the State of Nevada may *regulate* interstate communications facilities as public utilities without prior authorization by the Congress.

Nevada's contention that the Appellants' operations are purely intrastate (Motion to Dismiss or Affirm, p. 14) totally ignores the considered judgment of the FCC. The State fails to attempt to distinguish the teachings of *Gibbons v. Ogden* (1824) 9 Wheat. 1, 6 L.Ed. 23; *Buck v. Kuykendall* (1925), 267 U.S. 307, 69 L.Ed. 623, 45 S. Ct. 324, 38 A.L.R. 286, and *Bush & Sons v. Maloy* (1926), 267 U.S. 317, 69 L.Ed. 627,

45 S. Ct. 328. The principle firmly established by these cases is that a state may not regulate interstate commerce even though the federal government has not chosen to do so. Nevada, in the instant case, is not seeking simply to impose some oblique requirements incident to the operation of the system; it seeks to regulate Appellants' businesses as public utilities and claims to have jurisdiction over rates, conditions of service, ownership and all the other incidents of ordinary public utility control.

It is true that William Henry, then Chairman of the Federal Communications Commission, stated in 1965 that the federal agency did not contemplate regulation of community antenna systems on such matters as rates, conditions of service or the award of franchises (cf. Motion to Dismiss or Affirm, pp. 12-13). It is also true that in a press release issued in February, 1966, the federal commission recommended to Congress that any new legislation should provide for no federal preemption except to the extent of direct conflict with the provisions of the Communications Act. The Commission requested the Congress to "consider the appropriate relationship of federal to state—local jurisdiction over CATV systems (particularly with regard to initial franchises, rate regulation, and related matters)". That the federal agency asked Congress to consider these matters only underscores the point that congressional action is needed to authorise state regulation. The State of Nevada has taken upon itself the prerogative of Congress in purporting to exercise authority over interstate communications prior to congressional authority, based solely upon the recommendation

of the federal agency to Congress that the Congress should consider authorizing state control. Appellants suggest that Nevada lacks the power it asserts as a matter of constitutional law.

THE SUPREMACY ISSUE

Appellees attempt to sidestep the Supremacy issue. On pages 13 and 14 of the Jurisdictional Statement, Appellants summarized their position to the effect that the federal policy is that all interstate communications facilities except common carriers are not to be regulated as public utilities. *National Broadcasting Co. v. Board of Public Utility Commissioners* (1938 D.C. N.J.) 25 F. Supp. 761, was cited for the proposition that a state could not regulate broadcast stations as public utilities, even though the federal government did not do so under the Communications Act of 1934. The federal policy of no utility-type regulation is described in *F.C.C. v. Sanders Bros. Radio Station* (1940) 309 U.S. 470, 474, 84 L.Ed. 869, 874, 60 S. Ct. 693; *United States v. R.C.A.* (1959) 358 U.S. 334, 348, 3 L.Ed. 354, 79 S. Ct. 45. A number of circuit decisions reach the same result. cf. *Allan B. Dumont Laboratories v. Carroll* (CCA 3, 1950), 184 F(2d) 153. Appellants also pointed out that the federal agency had determined that community antenna systems are not common carriers under the federal statute. The extensive controls of Title II of the Communications Act (47 USCA 201-222) do not apply as a matter of existing federal policy. The question is, therefore, may a state regulate CATV systems as public utilities

in the face of the existing congressional determination fixing a no-regulation policy.

The State of Nevada cites *Dispatch, Inc. v. City of Erie,* (W. D. Pa., 1965) 249 F. Supp. 267, for the proposition that the federal government has not assumed jurisdiction of community antenna systems. This case was reversed by the Circuit Court of Appeals for the Third Circuit (CCA 3, 1966), 364 F(2d) 539. The Circuit invited the District Court to take judicial notice of the contents of Release G No. 79927 (364F(2d) at 541). This release is a summary of the Second Order and Report dated March 8, 1966 and cited extensively in the Appellants' Jurisdictional Statement. In other words, after the decision of the District Court in the *Dispatch* case, the Commission explicitly took jurisdiction over CATV operations and in a comprehensive order and report prescribed certain rules and regulations incident to their operation. Public utility-type regulation by Nevada would necessarily interfere and conflict with the federal policies announced in the Commission's Second Order and Report. While a detailed description of these conflicts is beyond the scope of this reply memorandum, it is clear that collisions are inevitable between present Commission rules and plenary state regulation. Among the conflicts are the following:

(a) The federal order requires community antenna systems to refrain from duplicating network programs broacast by local stations where the systems operate within the Grade B contour of the station (Second Report and Order, supra, para. 51-65.) This ruling constitutes a prohibition upon

the system from releasing certain television programs which its subscribers have heretofore obtained through such facilities. The state interest would be to make all programming available to the subscriber.

(b) The Commission prohibits community antenna operation without Commission consent in the top 100 markets of the country (Second Report and Order, supra, pars. 189-146). If a state was to issue a certificate of public convenience and necessity for the operation of a community antennt system in such a city—a right necessarily claimed by the State of Nevada—such a ruling would necessarily and directly conflict with the federal policy.

(c) The Commission required filing of information with respect to the ownership of all of the community antenna systems in the United States (Second Report and Order, supra, para. 99, 100). Moreover, the Commission has recently initiated a ruling making inquiry into the question of ownership patterns in the CATV industry and related matters. (Notice of Inquiry, FCC Docket No. 17371, ... Fed. Register ...., dated April 17, 1967). Thus the critical question of ownership is, according to the federal expert, within the power of the federal agency; whereas, under the Nevada legislation the state would have the power to control such questions.

(s) The Commission has stated that it has jurisdiction over CATV systems; (Second Report

and Order, supra, para. 8 et seq.; see its Memorandum on Jurisdiction attached to its Report and Order as Appendix C) that its study will continue (para. 150, 155 supra). *Ad hoc* procedures were established to pass upon individual problems (supra, para. 97, 98).

In a full presentation by briefs and argument the Appellants can demonstrate beyond reasonable question that state public utility regulation would necessarily conflict with the kinds of federal controls in existence under the existing act and administrative rulings.

THE FOURTEENTH AMENDMENT ISSUE

A substantial question exists under the Fourteenth Amendment. State regulation of Community antenna systems does not involve the ordinary type of public utility controls where the state agency is able to afford a degree of protection commensurate with the regulations imposed upon a given business. All facets of communication by radio other than specific common carriers are under the existing statutory scheme, subject only to the control of the United States. The federal government licenses and regulations the operation of commercial broadcast stations, VHF and UHF translators and boosters, and all other communications facilities which constitute the competition for Community antenna systems. The federal government regulates the microwave common carriers which feed signals of the originating station, and upon which the systems are totally dependent. The State's arguments at pages 10

through 14 of its Motion to Dismiss or Affirm entirely ignore these undisputed facts.

Plaintiff's systems are now operating by reason of proprietary and contractual rights obtained from the municipalities and the owners of utility poles in the communities where Appellants conduct their businesses. That the Appellants may have voluntarily contracted with the cities or the pole line companies to pay certain charges as an incident to the use of public streets and ways and utility company poles does not in any fashion alter their rights to raise the constitutional issues where the state seeks to superimpose public utility regulations upon their operations. There is no dispute in this case as to whether the plaintiffs have the private right necessary to operate their respective businesses; the only dispute is whether a state may constitutionally impose public utility controls in view of the relationship of community antenna systems to the existing federal regulatory scheme.

Appellants do not quarrel with the public utility concept in any abstract sense. They merely question the power of a state to subject CATV systems to public utility regulation in view of the fact that all of the substantial elements of their operation, and their competition, are within the sole power and control of the United States.

The District Court recognized that substantial constitutional questions were raised. It deferred a consideration of these issues on the erroneous grounds that the question as to whether Appellants' businesses constituted interstate commerce was a state rather than

a federal question. Appellants suggest that the reversal of the District Court upon this point is required and that this court should consider and pass upon the constitutional issues without the expenditure of time and money incident to the making of a record which would, in any event, only substantially duplicate the record made in the District Court.

More than 1600 community antenna systems are in operation throughout the United States. The FCC has taken notice of the possibility of wiring 85% of all television sets in the country—40 million homes. (Second Report and Order, supra, para. 88 and sources cited.) A number of states have adopted the view, either by statute or administrative ruling, that they have the power to impose regulatory controls. The court should exercise its power to decide the issues on their merits in view of the widespread industry and public interest. There is a real and urgent need for settling this controversy involving, as it does, the appropriate federal-state relationships in the dynamic communications area.

SUMMARY

From the reasons stated, Appellees' Motion to Dismiss and Motion to Affirm should be denied. The court should note probable jurisdiction.

RESPECTFULLY SUBMITTED this 2nd day of June, 1967.

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

Plaintiffs TV Pix, Inc. and Wells, TV, Inc., respectfully move the court for an order granting leave to said plaintiffs to file a Supplemental Complaint in the above entitled actions in substantially the form attached to this motion. This motion is made upon the following grounds:

1. This motion is filed pursuant to the provisions of Rule 15(c) of the Rules of Civil Procedure.

2. Subsequent to the filing of the Appellants' Jurisdictional Statement on appeal to the United States Supreme Court, and during the time when the said United States Supreme Court had jurisdiction of said appeal, to-wit: On April 20, 1967, the Governor of the State of Nevada signed into law an Act duly adopted by the Legisltaure of the State of Nevada, known as Assembly Bill #488. Said bill is known as Chapter 458, Nevada Revised Statutes, and was effective April 20, 1967. Relevant portions of said Act are attached to this pleading as Appendix A.

3. A.B. #488 establishes as public policy of the State of Nevada that said state has the right and power to regulate community antenna companies as public utilities and prohibits the operation of community antena companies without a certificate of public convenience and necessity issued by the Public Service Commission of the State of Nevada.

4. The issues raised by the enactment and adoption of A.B. #488, also known as 458 NRS, are the

same issues presented to the court by the plaintiffs' complaints in the above entitled cases and the issues framed by the pleadings therein. No new evidence will be required for an adjudication of the issues pleaded by the Supplemental Complaint.

3. The filing of the Supplemental Complaint is reasonably required for an adjudication of the rights, powers and duties of the parties as of the date of any decree issued by this court with respect to the merits of this cause. The filing of said Supplemental Complaint is reasonably required for the resolution and determination of the issues heretofore framed by the parties and the court.

RESPECTFULLY SUBMITTED this 2nd day of June, 1967.

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SUPPLEMENTAL COMPLAINT

Plaintiffs complain of defendants and for cause allege:

1. Paragraphs 1, 2, 3, 4, 5, 6, and 7 of plaintiff's Complaint in the District Court in #1814 are incorporated herein by reference.

2. Paragraphs 2 and 3 of plaintiff's Complaint in the District Court in #1827 are incorporated herein by reference.

3. On or about the 20th day of April, 1967, the Governor of the State of Nevada signed a certain law duly enacted by the Legislature of said state known as Assembly Bill #488. Relevant portions of said bill are attached to this pleading as Appendix A. Under the provisions of said bill, the defendants are empowered and required to regulate the business affairs and operations of the community antenna systems owned and operated by the plaintiffs in Elko, Carson City, Stateline and Wells, Nevada. Said bill and the application by the defendants of the provisions of said bill would conflict with the provisions of Article I, Section 2; Article VI, and the Fourteenth Amendment to the Constitution of the United States and would further conflict and interfere with the Federal Communications Act of 1934 (47 USCA Sec. 151 et seq.) and certain rules, regulations, decisions and order of the Federal Communications Commission pursuant to said Federal Communications Act of 1934. The defendants have interpreted the business activities of the plaintiffs as constituting intrastate rather than interstate com-

merce; whereas, in fact and law, the community antenna systems owned and operated by the plaintiffs constitute a link in a chain of interstate commerce and constitute interstate communication by radio.

4. Paragraphs 10 and 11 of plaintiff's Complaint in #1814 and paragraph 11 of plaintiff's Complaint in #1827 are incorporated by reference.

5. Unless restrained by this court, the defendants will impose the provisions of A.B. #488, now known as NRS Chapter 458, upon the plaintiffs and will adopt regulations making orders and rulings pursuant thereto, and will otherwise subject plaintiffs to the requirements thereof.

WHEREFORE, plaintiffs pray that the court make and enter its orders as follows:

1. Permanently and temporarily enjoining, restraining and prohibiting the defendants or any of them, or their successors in interest, as members of the Public Service Commission of the State of Nevada, acting singly or in concert with any other persons, from enforcing or making effective or carrying out the provisions of A.B. #488, now known as Chapter 458 of the Nevada Revised Statutes, and particularly Sections 6, 8, 9, 11, 13, 15, 18, 19, 20, 21 and 22 thereof, and from imposing any regulations, orders or rulings with respect to the operation of plaintiffs' community antenna systems in the State of Nevada or adopting or making effective any rules, regulations or ordinances pursuant to the provisions of A.B. #488 and declaring and adjudicating that insofar as said A.B. #488 pur-

ports to enable the State of Nevada to regulate plaintiffs' community antenna systems as public utilities, the said enactment is null and void and of no further force or effect.

2. Making and entering a temporary restraining order and preliminary injunction restraining and prohibiting defendants from investigating or otherwise taking any jurisdiction over plaintiffs of its community antenna systems, or imposing any regulation with respect thereto, or otherwise endorsing or making effective the provisions of the Nevada statute known as A.B. #438, approved April 20, 1967, now known as Chapter 458, NRS, until a final hearing and determination of the issues in this cause upon the merits.

3. Determining and adjudicating that the community antenna systems owned and operated by the plaintiffs are engaged in interstate commerce.

4. Determining and adjudicating that the community antenna systems owned and operated by the plaintiffs are not public utilities and are not vested with a public interest, and that any purported or attempted regulation of such systems by the State of Nevada is contrary to the provisions of the Fourteenth Amendment to the United States Constitution.

5. Determining and adjudicating that the Government of the United States has fully occupied or has the power to fully occupy the field of interstate communication, including that portion of the communications industry involved in the operation of community antenna systems, and that the State of Nevada

has no lawful power to impose terms or regulations with respect to community antenna operation.

6. Making such temporary orders, injunctions and prohibitions as may be required to prevent the defendants or any of them, individually or in concert with others, from making effective the provisions of A.B. #488, also known as Chapter 458, NRS, insofar as the same is applicable or purports to be applicable to the operation of plaintiffs' community antenna systems in the State of Nevada.

7. Plaintiffs pray for their costs and disbursements herein and for such other and further relief as to the court shall seem just and equitable.

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APPENDIX A

Assembly Bill No. 488—Committee on Judiciary

CHAPTER 458

AN ACT relating to community antenna television companies; providing for the issuance of certificates of public convenience and necessity by the public service commission of Nevada; granting the right of eminent domain; providing a penalty; and providing other matters proper relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 37.010 is hereby amended to read as follows:

37.010 Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

• • •

16. Community antenna television companies. Community antenna television companies which have received a certificate of public convenience and necessity from the public service commission of Nevada, including the right to use the wires, conduits, cables or poles of any other public utility when:

(a) It creates no substantial detriment to the service provided by the utility;

(b) It causes no irreparable injury to the utility; and

(c) The public service commission of Nevada, after giving notice and affording a hearing to all persons affected by the proposed exercise of the power of eminent domain, has found that such exercise is in the public interest.

SEC. 2. Chapter 318 of NRS is hereby amended by adding thereto a new section which shall read as follows:

No district proposing to furnish television facilities, as provided in section 29 of Senate Bill No. 408 of the 54th session of the Nevada legisature, may be organized which includes any area already served by a community antenna television company which possesses a certificate of public convenience and necessity from the public service commission of Nevada unless application is made to the public service commission of Nevada and the commission determines it necessary to revoke in whole or in part the certificate of the community antenna television company for the area involved.

SEC. 8. NRS 704.020 is hereby amended to read as follows:

704.020 1. As used in this chapter, "public utility" shall mean and embrace:

• • •

(d) Any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricity. The provisions of this paragraph do not apply to interstate commerce.

(e) Radio or broadcasting instrumentalities [except those subject to the jurisdiction of the Federal Communications Commission] *providing common or contract service* and airship common and contract carriers.

(f) All companies which may own cars of any kind or character, used and operated as a part of railroad trains, in or through this state.

All duties required of and penalties imposed upon any railroad or any officer or agent thereof shall, insofar as the same are applicable, be required of and imposed upon the owner or operator of such automobiles, auto trucks or other self-propelled vehicles transporting persons or property for hire over and along the highways of this state as common carriers, express companies, telegraph and telephone, radio, broadcasting, airship companies, and companies which may own cars of any kind or character, used and operated as a

part of railroad trains in or through this state, and their officers and agents, and the commission shall have the power of supervision and control of such companies and individuals to the same extent as of railroads.

(g) Community antenna television companies.

2. "Public utility" shall also embrace:

• • •

The commission is hereby invested with full power of supervision, regulation and control of all such utilities, subject to the provisions of this chapter and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village, unless otherwise provided by law.

3. The provisions of this chapter and the term "public utility" shall apply to:

(a) The transportation of pasengers and property and the transmission or receipt of messages, intelligence or entertainment, between points within the state.

(b) The receiving, switching, delivering, storing and hauling of such property, and receiving and delivering messages.

(c) All charges connected therewith, . . .

• • •

SEC. 4. Title 58 of NRS is hereby amended by adding thereto a new chapter to consist of the provisions set forth as sections 5 to 22, inclusive, of this act.

SEC. 5. This chapter may be cited as the Nevada Community Antenna Television System Law.

SEC. 6. 1. Upon investigation, the legislature of the State of Nevada has determined that the rates, services and operations of community antenna television companies are affected with a public interest.

2. It is the intent of the legislature in the enactment of this chapter to:

(a) Provide fair regulation of CATV companies in the interest of the public, to promote adequate, economical and efficient CATV system service to citizens and residents of this state;

(b) Provide just and reasonable rates and charges for CATV system services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices;

(c) Encourage and promote harmony between CATV companies and their subscribers;

(d) Cooperate with other states and with the Federal Government in promoting and coordinating efforts to regulate effectively CATV companies in the public interest; and

(e) Vest authority in the commission to regulate CATV companies generally and their rates, services and operations, in the manner and in accordance with the policies set forth in this chapter.

SEC. 7. The words and phrases used in this chapter have the meanings ascribed to them in sections 8 to 12, inclusive, of this act unless a different meaning clearly appears in the context.

SEC. 8. "CATV company" means any person or organization which owns, controls, operates or manages a community antenna television system, except that such definition does not include:

1. A telephone, telegraph or electric utility regulated by the commission in a case where it merely leases or rents to a CATV company wires or cables for the redistributoin of television signals to or toward subscribers of such CATV company; or

2. A telephone or telegraph utility regulated by the commission in a case where it merely provides commu-

nication channel service under published tariffs filed with the commission to a CATV company for the redistributoin of television signals to or toward subscribers of such CATV company.

SEC. 9. 1. "CATV system" means any facility within this state which is constructed in whole or in part in, on, under or over any highway or other public place and which is operated to perform for hire the service of receiving and amplifying the signals broadcast by one or more television stations and redistributing such signals by wire, cable or other means to members of the public who subscribe to such service.

2. Such definition does not include:

(a) Any system which serves fewer than 50 subscribers; or

(b) Any system which serves only the residents of one or more apartment dwellings under common ownership, control or management, and commercial establishments located on the premises of such dwellings.

SEC. 10. "Commission" means the public service commission of Nevada.

SEC. 11. "Facility" means all real property, antennae, poles, wires, cables, conduits, amplifiers, instruments, appliances, fixtures and other personal property used by a CATV company in providing service to its subscribers.

SEC. 12. "Highway" means every street, road, alley, thoroughfare, way or place of any kind used by the public or open to the use of the public as a matter of right for the purpose of vehicular traffic.

SEC. 13. In determining whether a certificate of public convenience and necessity should be issued to a CATV company the commission shall take into consideration, among other things, the public need for the proposed service or acquisition, the suitability of the applicant, the financial responsibility of the applicant,

and the ability of the applicant to perform efficiently the service for which authority is requested.

SEC. 14. 1. If application is made to the commission within 90 days after the effective date of this act, or within 90 days after the final determination of any action or proceeding brought to contest the constitutionality of chapter 704 of NRS as applied to CATV companies which is pending on such effective date or which is commenced within 90 days after such effective date the commission shall issue a certificate of public convenience and necessity to any CATV company lawfully engaged in the construction, extension or operation of its CATV system on the date of approval of this act, for the construction, extension or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction, extension or operation and without further proceedings.

2. The construction, extension or operation of such a CATV system may be lawfully continued pending the filing of such an application and its disposition unless the commission orders otherwise.

3. An application for such a certificate which is untimely shall be determined in accordance with the procedure prescribed in chapter 704 of NRS and such certificate shall be issued or refused accordingly.

SEC. 15. The commission may, after affording an opportunity for hearing, order a CATV company to:

1. Construct and operate any reasonable extension of its existing CATV system within the certificated territory; or

2. Make any reasonable repair or improvement of or addition to such system.

SEC. 16. The commission shall from time to time visit the places of business and other premises and examine the records and facilities of all CATV companies

to ascertain if such companies have complied with the rules and regulations and orders of the commission.

SEC. 17. The commission may, after affording the holder an opportunity to be heard, revoke, suspend or alter any such certificate of public convenience and necessity for the willful violation of any provision of this chapter or chapter 704 of NRS or the rules, regulations or orders of the commission made under the authority of this chapter, or for other reasonable cause.

SEC. 18. The commission shall supervise and regulate every CATV company operating within this state and its property, easements, property rights, equipment, facilities, contracts, certificates and franchises so far as may be necessary to carry out the purposes of this chapter, and to do all things whether specifically designated in this chapter or chapter 704 of NRS or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction.

SEC. 19. 1. Every CATV company and every person and organization providing any service, equipment or facilities thereto shall provide safe and adequate service, equipment and facilities for the operation of its CATV system.

2. No CATV company may demand or receive a greater, less or different compensation for providing CATV service than the rates and charges specified in the tariff in effect at the time.

3. All rates, charges and classifications for the service rendered by a CATV company shall be just and reasonable.

4. No CATV company may make any unjust or unreasonable discrimination in rates, charges, classifications, practices, regulations, facilities or services for or in connection with like service, directly or indirectly, by any means or device, or make or give any undue or unreasonable preference or advantage to any particular person, class of persons or locality, or subject

any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

5. Every CATV company and other person and organization shall obey and comply with the rules, regulations and orders adoted by the commission under the provisions of this chapter.

SEC. 20. 1. Upon the prior approval of the commission, any person or organization may contract to lease or rent facilities to a CATV company or to provide it with communication channel service for the redistribution of television signals to or toward the subscribers of such CATV company.

2. Any such contract which is in effect on the effective date of this act and which will be in effect for a period of more than 90 days thereafter shall be submitted to the commission for approval within 90 days after the effective date of this act, and if such contract is disapproved it shall become void.

SEC. No CATV company operating or managing a CATV system may combine, merge or consolidate with, or acquire control of, another organization in this state without first obtaining the approval of the commission, which shall be granted only after an investigation and finding that such proposed combination, merger, consolidation or acquisition is in the public interest.

SEC. 22. Any person, whether in his individual capacity or as an agent, employee or officer of any organization, who violates any provision of this chapter or any rule or regulation promulgated thereunder is guilty of a misdemeanor.

Signed by the Governor as Effective upon April 20, 1967.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

TV PIX, INC., ET AL. *v.* ALLARD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA.

No. 79. Decided October 9, 1967.

PER CURIAM.

The judgment is vacated and the case is remanded to the District Court to give that court an opportunity to consider the appellants' motion to file a supplemental complaint based upon changes in the relevant Nevada law.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.